OXFORD PUBLIC INTERNATIONAL LAW

Max Planck Encyclopedia of Public International Law

United Nations Charter

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Content type: Encyclopedia Entries
Article last updated: April 2011

Product: Max Planck Encyclopedia of Public International Law [MPEPIL]

Subject(s):

United Nations (UN) — UN Charter

Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum.

A. We, the Peoples of the United Nations

1 The first seven words of the UN Charter sound familiar. They, naturally, are reminiscent of the American Constitution of 1787 and, further, of the constitutional movement one can trace back to the Magna Carta as it has grown over the centuries. The term 'Charter' itself, is not a term of international law, but has also been taken over from constitutional law with specific reference to the Magna Carta of 1215. In contrast, the Covenant of the League of Nations did not pretend to be more than it stated, ie a covenant, an agreement between parties. At the outset, the Charter bears the stamp of its initiator, US President Roosevelt, and of the democratic aspirations of the United States of America for the organization to be born in the wake of World War II.

2 The history of the negotiation of the organization clearly identifies the major influence (United Nations Charter, History of; United Nations [UN]). Much of the preparatory work was carried out by a group in the State Department of the United States, headed by Leo Pasvolsky. The group drafted a document in 1944 entitled Tentative Proposals for a General International Organization. The proposals were submitted to the United Kingdom, the Soviet Union, and China. The countries had agreed at the Moscow Conference and Tehran Conference (1943) to set up an international organization after the war and agreed to participate in informal conversations in order to coordinate the views of the Great Powers.

3 The conversations took place at the Dumbarton Oaks Conference (1944) from 21 August to 29 September 1944. The United States proposals were accepted as a basis for discussion, as they were the most fully developed. Ultimately, the substance of the American proposals was also accepted by the other powers. The proposals envisaged a multipurpose organization, but whose primary purpose would be to maintain international peace and security. Like the League of Nations, the proposed organization would include two principal organs: a large Assembly where all States would be represented; and a smaller Council with a Great-Power nucleus. The Charter, however, would delineate more clearly than did the League Covenant the functions of the two organs.

4 A number of important questions were left unresolved at Dumbarton Oaks. The most important was the issue of voting procedure in the Council. That question was decided by Roosevelt, Churchill, and Stalin at the Yalta Conference (1945). The three leaders also decided to hold a general conference in San Francisco at which the 47 States that had declared war on the axis powers and had adhered to the 1941 Declaration by United Nations would draft the Charter of the Organization.

5 Fifty States participated in the Conference that convened on 25 April 1945 in San Francisco. All the adherents to the 1941 Declaration by United Nations were represented, except Poland, as the sponsoring governments were unable to agree on the Polish government to be recognized. Nevertheless, a provision was made to consider Poland as an original member once a Polish government acceptable to all Yalta Powers had ratified the Charter. In addition, Argentina, Denmark, the Byelorussian SSR, and the Ukrainian SSR were invited after the Conference had begun.

6 The invitation to the Conference specified that the Proposals for the Establishment of a General International Organization ('Dumbarton Oaks Proposals') were to be considered 'as affording a basis' for the Charter. The United States thus provided the fundamentals. All committee chairmen were American, with the exception of the Committee on Credentials. The American delegation was led by the Secretary of State, Edward Stettinius, who was present during the whole conference, while the foreign ministers of the other Great Powers had to leave in mid-May. Stettinius was accompanied by a delegation of high-ranking politicians, including senators Connally and Vandenberg, and, as a senior advisor representing the Republican Party, John Foster Dulles.

7 The basic principles set out in 1944 were not changed in substance. In particular, challenges to limit the veto powers of permanent members of the Security Council were defeated. To be carried, any proposal had to be adopted by two-thirds of the members present and voting. Some of the

proposals differed from the Dumbarton Oaks Proposals. The powers of discussion of the Assembly were expanded, allowing it to become the world forum for public opinion on a wide variety of issues. Other proposals that had not been included in the preliminary draft were adopted, for instance the chapters on the United Nations trusteeship system.

8 The Charter was adopted on 25 June 1945 and signed by the representatives of 50 States the following day. The requirement for ratification by the five permanent members of the Security Council and by a majority of the other signatory States was satisfied on 24 October 1945.

9 'We, the Peoples of the United Nations', the words, were not included in the Dumbarton Oaks Proposals. The experts party to the 1944 conversations had not proposed a preamble. They drafted the first two articles, on the purposes and principles of the Organization, in what they considered precise legal language and were content at that (United Nations, Purposes and Principles). The Conference did not see the issue the same way. It endorsed Marshal Smuts' proposal to add a preamble 'in a language that should appeal to the heart as well as to the mind of men'. When the Smuts proposal was watered down through negotiations, it was proposed that the American poet and former Assistant Secretary Archibald MacLeish rewrite the text. The proposal was rejected and MacLeish moved on to head the US delegation at the London conference on the United Nations Educational, Scientific and Cultural Organization (UNESCO).

10 The specific wording 'We, the Peoples of the United Nations' was tabled by the delegation of the United States and probably proposed by one of its members, Sol Bloom, of the House of Representatives. The reference to 'We, the People of the United States' came naturally to Bloom. It was not easily accepted by Committee I/1. It ran against the tradition of international law as well as the practice of certain Member States. The representative of the Netherlands pointed out that, in his country, sovereignty was a prerogative of the Crown, not the people. The delegate of the United States had to insist on the necessary democratic foundations of the new organization, after years of war, to carry the proposal.

11 The reference to the 'Peoples of the United Nations' was not only a vague political formula. It already had legal consequences in 1945, with the inclusion in Arts 1 and 55 of the 'respect for the principle of equal rights and self-determination of peoples'. It paved the way for future developments, in particular in the fields of decolonization, of human rights, of democracy, and of partnership of the Organization with the civil society.

12 However, the last paragraph of the Preamble reverts to a more traditional practice. By declaring that '[a]ccordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations', the Conference does affirm the intergovernmental nature of the Organization, based on an international treaty concluded by sovereign States.

13 The contradiction between the opening words and the last paragraph of the Preamble is at the heart of the Organization, of its Charter, as well as its practice over the years. The tension between the two provisions is still with us. It is an exact and necessary reflection of the state of the international community in 1945 as well as today.

B. Structure and Semantics

14 The Charter is quite a lengthy text: a preamble, 111 articles, and an annex, the Statute of the International Court of Justice. By comparison, the Covenant establishing the League of Nations was 26 articles long. The articles are grouped into 19 chapters. The Preamble and Chapter I (Arts 1 and 2) express the purposes and principles of the Organization. Chapters III (Organs); IV (United Nations, General Assembly); V (United Nations, Security Council); X (United Nations, Economic and

Social Council [ECOSOC]); XII (Trusteeship Council); XIV (International Court of Justice [ICJ]); and XV (Secretariat) establish and describe the principal organs of the Organization. Chapters VI (Peaceful Settlement of International Disputes) and VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression) specify in greater detail the powers of the organs and their relations. Chapters VIII (Regional Arrangements); IX (International Economic and Social Cooperation); XI (Declaration Regarding Non-Self-Governing Territories); XII (International Trusteeship System); and XVII (Transitional Security Arrangements) express additional rights and obligations of the Member States. Chapter II deals with membership. Chapter XVI contains miscellaneous provisions. Chapters XVIII (United Nations Charter, Amendment) and XIX (Signature and Ratification) address the final issues.

15 The Charter is not only a legal text, stating legal purposes and principles, specifying norms, organizing sanctions, or establishing organs; it is also a political message addressed by the Peoples of the United Nations to the Peoples of the United Nations. The wording was deliberately simplified, so as to be understood by public opinion throughout the world, to address hearts as well as minds. Expressions such as 'the scourge of war', 'to practice tolerance', or 'peace-loving States' carried a specific and emotional meaning in 1945. There is a redundancy of notions held fundamental. The words 'international peace and security' are repeated 28 times in the text. Expressions such as 'threat to the peace', 'peaceful settlement', and 'respect for human rights without distinction as to race, sex, language or religion' appear frequently. The addition of the Preamble did not simplify the matter. The 'Peoples' of the opening words are the 'peoples' of a Member State. They are not the same as the 'peoples' mentioned in Art. 1 (2) in relation to self-determination (Peoples).

16 The general and open-ended nature of the wording is compounded by the lack of definition of the terms employed; the drafters eschewed definitions. Contrary to the Anglo-Saxon tradition, the Charter does not attempt to clarify the meaning of the terms used. The only four definitions specified in the Charter are related to 'enemy state' (Art. 53 (2); United Nations Charter, Enemy States Clauses), 'specialized agencies' (Art. 57 (2); United Nations, Specialized Agencies), 'trust territories' (Art. 75)' and 'administering authority' (Art. 81). But important terms (aggression or armed attack come immediately to mind) are not clarified in the text of the Charter. Their further definitions, whether by UN General Assembly Resolution 3314 (XXIX) 'Definition of Aggression' ([14 December 1974] GAOR 29th Session Supp 31 vol 1, 142) or by the ICJ, have not gone unchallenged.

17 Special mention must be made of languages. Art. 111 declares 'the Chinese, French, Russian, English, and Spanish texts are equally authentic'. The Dumbarton Oaks Proposals were drafted in English. The San Francisco Conference decided the five languages would be the official languages of the Conference, but used two working languages: English and French. As a result, the *travaux préparatoires* were published in these two languages. At the end of the Conference, all participating States signed the five versions. The working languages or the languages of the inviting powers would have no precedence. In case of difficulty, it is accepted that Art. 33 Vienna Convention on the Law of Treaties (1969) ('VCLT'), is applicable, even to non-Member States, as a reflection of customary international law.

18 Interestingly, there has been relatively little difficulty on the issue of diverging linguistic interpretations within the Organization. The *Repertory of Practice of United Nations Organs* and the *Repertory of the Practice of the Security Council* do not signal any discussions on implementation of Art. 111 Charter. The issue has only come up at the ICJ, in relation with interpretation of Art. 36 (5) ICJ Statute. The decisions taken by the Court in the two relevant cases (*Aerial Incident of July 27th, 1955 [Israel v Bulgaria] [Preliminary Objections]* [1959] ICJ Rep 127; *Military and Paramilitary Activities in and against Nicaragua [Nicaragua v United States of America] [Jurisdiction and Admissibility]* [1984] ICJ Rep 392) do not depart from the rules as codified in the VCLT on the subject.

19 The open texture of the Charter, with its ambiguities, is not logically satisfactory. The delegations in San Francisco decided explicitly not to provide for any centralized interpretation of the Charter provisions, but to leave the task to the organs of the Organization acting within their jurisdiction (United Nations Charter, Interpretation of). That decision has added to the complexity of the overall picture. But, as it stands, the wording of the Charter does have its advantages. As any compromise text, it certainly helped in reaching an agreement in San Francisco. More importantly, it has since encouraged creative interpretation over the years and had eased adaptation of the Organization to challenges unimaginable in 1945. The flexibility built into the Charter wording is all the more welcome because formal revision of its provisions through Arts 108 or 109 procedures has become well nigh impossible.

20 Napoleon Bonaparte once quipped: *'Il faut qu'une bonne constitution soit courte et obscure'* ('A good constitution should be short and cryptic' [translation by the author]). The Charter qualifies, at least on the second count.

C. Preamble; Purposes and Principles

21 The Preamble and Chapter I, entitled Purposes and Principles, must be considered together as the general statement of the purposes and principles of the Organization. They encapsulate the substantial norms and principles developed in the following chapters of the Charter, as opposed to the organic and institutional provisions which address the issue of balance of power.

22 As part of the Charter, the Preamble has the same legal value as the rest of the Charter. But it does not purport to impose obligations upon members. It sets forth the context within which the Charter's other provisions must be read. It is thus an element of interpretation of the Charter in accordance with Art. 31 (2) VCLT.

23 The first phrase sets forth the United Nations' principle *raison d'Être*: 'Determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind'. The phrase places the Charter in its historical context. The second phrase places the emphasis on human rights. The terrible violations of fundamental human rights during World War II, in particular the crime of genocide, were at the forefront of the preoccupations of the drafters.

24 The Preamble contains the only reference in the Charter to 'respect for the obligations arising from treaties'. The contrived formulation, lumping treaties with the 'other sources of international law' and calling for the Organization to establish 'conditions under which justice and respect' for the said obligations 'can be maintained', is the result of a compromise between States desiring to affirm the sanctity of treaties and those desiring to empower the Security Council to revise those treaties it considers inapplicable. The reference in the Preamble was not considered inconsistent with Art. 103 UN Charter, which provides that, in the event of a conflict, a Member's obligations under the Charter shall prevail over its obligations under any other international agreement.

25 Art. 1 states the purposes of the Organization. The primary purpose is 'to maintain international peace and security'. For the achievement of this end, two subsidiary purposes are mentioned. The first contemplates the use of 'effective collective measures'. The system is described in greater detail in Chapter VII UN Charter. The second subsidiary purpose is to bring about 'the adjustment or settlement of international disputes or situations which might lead to a breach of the peace'. The Organization's powers in that respect are laid out in Chapter VI. The reference to the qualification 'in conformity with the principles of justice and international law', limited to the peaceful settlement of disputes, has been questioned. Does it mean, by inference, that the Security Council, deciding upon collective measures within Chapter VII, is free to disregard justice and international law for the sake of maintaining international peace and security when it deems it expedient? The minutes of the Conference and in particular the report of Committee I/1 tend to leave a free hand to the

Security Council in order to use the force at its disposal to stop war. At a second stage, the Organization 'can find the latitude to apply the principles of justice and international law' (UNCIO vol 6, 453). However, the issue is still controversial.

26 Other purposes are stated in Art. 1. The second paragraph calls for the development of 'friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'. This principle is developed in Art. 55. Members' obligations are set forth in Arts 56 and 73. The General Assembly has defined the specific obligations relating to this purpose in the Friendly Relations Declaration (1970).

27 The third paragraph sets forward the goal of international cooperation in solving problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all. The concept of human rights is further developed in Art. 55 and in General Assembly resolutions.

28 Finally, the Organization is intended to be a centre for harmonizing the actions of nations in the attainment of these common ends. The wording underlines the consensual basis of action by the nations within the United Nations system. It has been interpreted as an attempt at sketching the transformation of a society of States into a community of nations.

29 Art. 2 states the principles that the Organization and its Members shall act in accordance with, in pursuit of the said purposes. By contrast with Art. 1, Art. 2 gives rise to direct rights and obligations. It is addressed to Member States, but also to the Organization itself. The provisions of Art. 2 are to be interpreted in the light of Art. 1. For instance, Art. 2 (4) prohibits use of force in any 'manner inconsistent with the purposes of the United Nations' (Use of Force, Prohibition of)

30 Sovereign equality of all its Members is the first principle (States, Sovereign Equality). A proposal was made in committee to delete the provision, as the Charter imposes substantial limitations on the sovereignty of its Members and as permanent members of the Security Council are accorded greater weight in decision-making. The proposal was rejected on the understanding that it referred to juridical equality, territorial integrity and political independence as attributes of all Members.

31 The principle of good faith (bona fide), stated in Art. 2 (2), has been considered as superfluous, as it is a principle of customary international law. The drafters nevertheless thought it desirable to state the principle explicitly.

32 Arts 2 (3) and (4) are generally considered as peremptory norms of international law (Ius cogens). Art. 2 (3) provides that '[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. The specific obligations of the Members—including a list of peaceful methods of dispute settlement—are described in greater detail in Chapter VI.

33 Art. 2 (4) is probably the single most important obligation imposed upon the Member States. It is also probably the most controversial. It requires all Members to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'. But is the reference to force limited to armed force? When would a build-up of armaments constitute a threat of force? Is the provision of arms to a de jure government for use in a civil war a use of force 'against the political independence' of a State? Is armed force used for humanitarian purposes 'inconsistent' with the purposes of the United Nations (Humanitarian Intervention; Responsibility to Protect)? The term 'force' encompasses a wider sphere of conduct than the term aggression. Moreover, the prohibition against the use or threat of force is subject to the 'inherent right of individual or collective self-defence' mentioned in Art. 51 (Self-Defence).

34 Art. 2 (5) provides that 'all Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter'. It is generally considered that the paragraph was designed to impose obligations upon Member States vis-à-vis the Organization that are no greater than the more specific ones imposed by Arts 25 and 43, among others. Furthermore, paragraph 5 calls on Members to 'refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action'. The express obligation thus stated is a useful clarification.

35 Art. 2 (6) imposes upon the Organization the duty of ensuring that non-Members act in accordance with the other principles 'so far as may be necessary for the maintenance of international peace and security'. It represents an innovation in international law, as it imposes obligations on third parties without their consent (Treaties, Third-Party Effect). But because of the importance of the principle to the success of the Organization's primary purpose, the power to take enforcement action against non-Members has been generally accepted.

36 Art. 2 (7) represents one of the more important limits upon the reach of the Organization's powers. The United Nations are prohibited from intervening in 'matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter'. The principle 'shall not prejudice the application of enforcement measures under Chapter VII'.

D. Players and Procedures

37 As a constitutional document, the Charter contains a number of organic provisions to effectively implement the purposes, principles, rules, and obligations stipulated in the text. Whether this qualifies the Charter as a 'Constitution' will be examined later (see paras 63–88 below).

38 Membership is the first step (International Organizations or Institutions, Membership). Chapter II contains the relevant provisions. The original members are those States that participated in the San Francisco Conference or that previously signed the Declaration by United Nations of 1 January 1942. To become a member, they are to sign the Charter and ratify it. Art. 4 stipulates: 'Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations'. The qualification is an important one and gave rise to the Admission of a State to Membership in the United Nations (Advisory Opinions) by the ICJ. For all practical purposes, the provision has been considered as moot since 1955, when the major powers agreed to admit all the applicant States, with the exception of special cases (Divided States, problems of State succession, etc). Membership of the Organization may be considered universal for all practical purposes.

39 Art. 5 provides for suspension of a Member against which preventive or enforcement action has been taken by the Security Council. Art. 6 provides for possible expulsion of a Member that has 'persistently violated the Principles contained in the present Charter'. In contrast with the Covenant, there is no provision in the Charter for withdrawal from the Organization. The weakening of the League of Nations by withdrawal of major States was in the mind of the negotiators at San Francisco; the diplomatic answer was to ignore the problem. In line with the Charter's absence of provision, the Organization chose to ignore the withdrawal of Indonesia on 20 January 1965; to consider Indonesia had only ended its co-operation, but not its membership of the United Nations; and that it was entitled on 19 September 1966 to resume full co-operation in the UN without readmission.

40 The principle organs of the Organization are a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat. For the purposes of this overview of the provisions of the Charter, we shall concentrate

on the General Assembly, the Security Council, and the Secretariat.

41 The General Assembly consists of all the members of the United Nations. It has a general competence. It may discuss any questions or matters within the scope of the Charter or relating to the powers and functions of any organs of the Organization. It may, except as provided for in Art. 12, make recommendations to the members or to the Security Council. Art. 12 does not allow the General Assembly to make recommendations in regard to a dispute or situation as long as the Security Council is exercising its functions with regard to that dispute or situation.

42 The Security Council consists of fifteen Members: the five permanent members (China, France, Russia, the United Kingdom, and the United States); and ten non-permanent members elected by the General Assembly for a two-year term. The Council has the primary responsibility for the maintenance of international peace and security (Art. 24).

43 The Secretariat comprises a Secretary-General (United Nations, Secretary-General) and such staff as the Organization may require. The Secretary-General acts in that capacity in all meetings of the principle organs (with the exception of the ICJ) and shall perform such other functions as are entrusted to him by these organs. He may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security (Art. 99).

44 There is no hierarchy among the principal organs of the organization. The distribution of powers is functional. The principal innovation is probably the majority rule. Decisions in the Assembly or the Council of the League require the agreement of all the members represented at the meeting. In the General Assembly, decisions are taken by a two-thirds majority on important questions and a simple majority on other matters. In the Security Council, decisions are taken by an affirmative vote of nine members on procedural matters. On all other matters, decisions are taken by an affirmative vote of nine members including the concurring votes of the permanent members. The so-called veto power mitigates the majority rule within the Organization.

45 The power of decision of the Security Council, enshrined in Art. 25, has expanded over the years with the creative interpretation of the terms of the Charter and, in particular, the notions of threat to the peace and breach of the peace.

46 As to the Secretary-General, his role has varied largely, depending on the political context and the personality of the holder of office. Figures such as Dag Hammarskjöld in the early years of the Organization or Kofi Annan more recently have played a significant role in developing the authority and powers of the Organization and of the office of the Secretary-General.

E. Revision and Reform

47 The Charter has weathered the passage of time well, at least in its substantial provisions. The purposes, principles, rules, and obligations set out in 1945 have been argued and their interpretation has often been hotly contested. Some provisions have become moot, as could be expected after sixty years. But the wording of the Charter has never been seriously challenged.

48 The same cannot be said of the organic and procedural provisions of the Charter. The precise details relating to the composition of the principal organs of the Organization, their voting procedures, and their respective powers cannot be modified all that easily by way of interpretation; resorting to the relevant articles on Charter amendment is necessary.

49 Art. 108 provides that amendments shall come into force for all members of the Organization when they have been adopted by two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the members of the United Nations, including all the permanent members of the Security Council.

50 Five amendments to the Charter have been adopted under Art. 108. Three of these have enlarged organs of the Organization: an amendment to Art. 23 increasing the membership of the Security Council from 11 to 15; and amendments to Art. 61 have twice increased the membership of ECOSOC, once from 18 to 27, and then again to 54. Amendments to Arts 27 and 109 have increased the number of votes required for Security Council decisions.

51 Art. 109 provides for the possibility of a general conference of the members of the Organization for the purpose of 'reviewing' the Charter. Any alteration of the Charter recommended by a two-thirds vote of the general conference would take effect when ratified by two-thirds of the members, including the five permanent members of the Security Council. No general review conference as envisaged by Art. 109 has been held. Proposals for such a conference were considered by the General Assembly in 1955 at its tenth session, but were not adopted. The question of the Charter review did remain, however, as an item on the agenda of the General Assembly, and a committee on Charter review met intermittently over the years to consider possible alterations of the Charter. Changes were proposed by the committee, but none was adopted by the General Assembly. More recently, a Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization has been meeting, but has not addressed the issue of Charter amendment, much less the convening of an Art. 109 conference.

52 Amendments to the Charter under Arts 108 and 109 enter into effect for all Members, including those that have failed to approve those amendments. This feature of the Charter, unusual in treaties, has given rise to the question of whether States dissenting from an amendment may withdraw from the Organization for that reason. The issue has not arisen in practice but at the founding conference in 1945, a committee report stated that it would not be the purpose of the Organization to compel a member to stay in the Organization if its rights and obligations were changed by a Charter amendment in which it had not concurred and was unable to accept.

53 The main issue over the last years has been Security Council reform, both in membership and in voting procedures. There appears to be a large degree of consensus on Security Council reform, to reflect the major changes in the international community since 1945 (United Nations, Reform). Negotiations are ongoing within the Organization. But to this day (2011), there is no perspective of a possibility of Charter reform. As a result, minor changes such as deletion of the 'enemy States' clauses or of the Trusteeship Council have not been possible.

54 As a result of the near nigh impossibility of Charter amendment, practice has borne the brunt of adaptation of the Charter to a changing world. The San Francisco conference decided not to rely on a centralized interpretation of the Charter, but to leave the task to each organ. In the words of Commission IV (Judicial Organization):

> In the course of the operation from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers … Accordingly, it is not necessary to include in the Charter a provision either authorizing or approving the normal operation of this principle ('Report of the Special Subcommittee of Committee IV/2 on the Interpretation of the Charter' in UNCIO *Documents of the United Nations Conference on International Organization vol 13 Commission IV: Judicial Organization* [United Nations Information Organizations New York 1945] 831).

The decision taken there introduced an element of flexibility and of ambiguity allowing for a degree of adaptation of the Charter to circumstances unforeseen in 1945.

55 The issue has been addressed as 'interpretation'. But the organs of the Organization and, in particular, the ICJ, tend to focus on the 'practice', the consequences of which can be to interpret, but also to supplement or to modify to a certain extent the provisions set down by the Charter.

56 Interpretation of the Charter by political organs of the Organization takes various forms. In some cases, the General Assembly has adopted resolutions which in broad terms lay down principles or rules which are declared to be based upon or inherent in the Charter. A well-known resolution is the Friendly Relations Declaration of 1970. Interpretation also takes place through the practice of the Organization, in particular when an organ characterizes conduct of States in specific situations as incompatible with Charter provisions. The condemnation of Apartheid in South Africa as contrary to the Charter is a notable example of such practice.

57 Interpretation, whether in general terms or in specific cases, may prompt questions of whether an interpretation has gone beyond the Charter and was, in effect, an attempt to amend the Charter without employing the procedures required for amendment. The legal service of the Organization has at times warned the principal organs against an interpretation that would modify a clear provision of the Charter, indicating that the Arts 108 and 109 procedures were mandatory.

58 But the ICJ, in its opinion delivered in 1971 on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* ([1971] ICJ Rep 16; South West Africa/Namibia [Advisory Opinions and Judgments]) all but recognized the amending powers of practice within the Organization. Called to interpret Art. 27 UN Charter, the Court noted that

> the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions (at para. 22).

59 In its Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory), the Court considered that 'the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter' (at para. 28). The test of consistency goes a step further than interpretation as understood in a traditional sense. As long as practice does not run clearly against the Charter provisions, it is deemed acceptable.

60 There also have been various opinions on whether Charter interpretations by the General Assembly are 'binding' on the Member States. General Assembly resolutions are not binding per se. But there is a widespread acceptance by Member States of the proposition that interpretations agreed to by all States or 'generally accepted' should be regarded as authoritative and have obligatory force inasmuch as they express the obligations already accepted in the Charter. However, when Member States are divided over the interpretation or where it is not clear that there has been general agreement, a resolution of the organ would not be regarded as binding *ipso iure* on Member States (International Law, Development through International Organizations, Policies and Practice). Resolutions may, however, be given weight as 'practice' to be considered as an element in the interpretation of the Charter.

61 Interpretation has significantly added to and modified the understanding of the Charter provisions. Prominent examples have been the interpretation that the Charter permits the Organization to use armed forces for peacekeeping functions based on the consent of parties rather than the enforcement provisions of Chapter VII; resolutions that implicitly recognize the authority of the General Assembly to censure States for violation of human rights and in some cases to recommend coercive measures, notwithstanding the limitation of Art. 2 (7) relating to domestic jurisdiction; and the important development of the qualification of 'threat to the peace' (Art. 39) to include situations of civil war, failure to demonstrate renunciation of terrorism, interruption of a democratic process, or proliferation of nuclear, chemical, and biological weapons and their means of delivery. Art. 41 measures have likewise been developed far beyond the interruption of economic relations or of means of communication or the severance of diplomatic relations. In the same vein, the Security Council established the international tribunals to prosecute

war criminals with regard to Rwanda and former Yugoslavia by binding resolutions under Chapter VII.

62 Theoretically, these actions could be challenged as *ultra vires*, overstepping the competences given to the Organization by the Charter. Under pressure, the Security Council has occasionally modified the substance of its decisions, for instance by adopting a delisting procedure for individual sanctions. But, interestingly, there has rarely been a practical case where it has been determined that an organ of the United Nations overstepped its competence.

F. Compact or Constitution?

63 Is the UN Charter the 'Constitution of the International Community', as it has been alleged? Or is it a compact, in the nature of the Covenant of the League of Nations, a treaty in the sense of the VCLT? The term 'constitution' certainly encapsulates the hopes of the delegations meeting in San Francisco, the 'constitutional movement' in the wake of World War II, and the yearning for a new and peaceful world order. But is it an appropriate legal tool to analyse the UN Charter?

64 The issue has triggered a lively doctrinal debate in the last decades. To assess the situation, it may be helpful to separate the legal issues from the political questions.

1. The Doctrinal Debate

65 The debate on the concept of the UN Charter as the constitution of the international community picked up steam in the 1990s after the fall of the Berlin Wall, the end of the Cold War (1947–91), and the hope for international institutions epitomized by the first President Bush.

66 The intellectual concept was aired out before the war, in particular by Alfred Verdross in relation to the Covenant of the League of Nations. The term was used in 1962 by Sir Humphrey Waldock in his report to the International Law Commission (ILC) on the Law of Treaties. Waldock qualified the Charter as 'the fundamental constitution and law of the international community' in his general course in The Hague. It was further developed by Wolfgang Friedmann in 1964. But it was still an uncertain notion until Verdross and Simma clarified it in the 1976 edition of their *Universelles Völkerrecht*. In 1976, Verdross stated that 'the UN Charter has gained the rank of the constitution of the universal community of States'. The concept has been since developed, in particular by the German school of international law with Jochen Frowein, Christian Tomuschat, and Bardo Fassbender among others.

67 If one takes a cursory glance at major textbooks, the debate was all but ignored in the UK and in the US. Riccardo Monaco did address the question in Italy, but with limited echo. The French positivist tradition is not very favourable, though authors such as Pierre-Marie Dupuy and Alain Pellet have shown some interest, but have been more cautious in their pronouncements than their German counterparts. In recent years, there has been a change of mood and a general propensity to refer to the Charter as the constitution of the international community, albeit in a lax mode.

68 But what are the true implications of the doctrinal debate? Beyond the rhetoric, there is a large degree of agreement on the major legal issues and the specific nature of the UN Charter. The political question is still a bone of contention.

2. The Legal Issues

69 The ICJ has always been cautious in its pronouncements. In 1962, in the Certain Expenses of the United Nations (Advisory Opinion), the Court noted that:

> [o]n the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of

treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics (at 10).

70 It elaborated its views on constitutional acts of international organizations in 1996 in its *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* ([1996] ICJ Rep 66). It noted that:

> From a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply … But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties (at para. 19).

71 The pronouncements of the Court are not the end of the story, but they do go to the heart of the problem, ie the dual nature of constitutions of international organizations in general and of the Charter in particular. There is a large consensus on the specificity of constitutions of international organizations. The VCLT concedes the point in its Art. 5: 'The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization'. The last words refer quite explicitly to the particular nature of the rules applicable to constituent instruments.

72 It is no coincidence if the Court, asked to deliver an advisory opinion on two requests, one by the UN General Assembly, the other by the Assembly of the World Health Organization (WHO), chose to make explicit its position on the nature of constitutional acts of international organizations in the second instance and not the first.

73 One must naturally distinguish between the general characteristics of the constituent instruments of international organizations and the specific features of the UN Charter. Among the former, one can note the primacy of the constituent instrument over other international obligations. That primacy may be reinforced by the exclusivity of the jurisdictional proceedings relating to respect of the primacy. It entails the obligation not to conclude further obligations incompatible with the constituent instrument. The same goes for unilateral decisions within the organization, which must be in conformity with the basic instrument.

74 All constituent instruments state the purposes and functions of the organization, membership, the composition, competence, and powers of its respective organs.

75 The constituent treaty must be respected in its integrity, which prohibits or strictly limits possible reservations. Art. 20 (3) VCLT is apposite here. Rules of interpretation must be adapted to the nature and specific functions of the organization, as recognized by the Court in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* requested by the WHO. Revision of the constituent instrument generally does not require unanimity and is nevertheless binding upon States that have not ratified the amendment. Most constituent treaties do not fix a time frame, thus endowing the organization with a permanence allowing the necessary continuity for an effective performance of its functions.

76 The Charter is quite evidently a very special organization, as the Court recognized in *Certain Expenses of the United Nations*. The historical conditions of the 'Act of Creation', its universality,

and the fundamental nature of the purposes and principles stated in the Preamble and Chapter I are not in dispute. More specifically, the Charter contains specific provisions unknown till then. The obligations imposed on non-Member States, in particular respect of Security Council decisions, run against traditional international law. The same can be said of Art. 103. The generality of the principle of superiority of Charter obligations over any other obligations, past or future, confers to the Charter a normative superiority that can be argued in its implementation (cf the Kadi Case of the European Court of Justice, 3 September 2008), but has not been challenged in principle. The same can be said of the relations between Charter law and *ius cogens*. The Charter certainly embodies some of the major rules of *ius cogens*. The dynamic interaction between Charter law and *ius cogens* has been positive over the years and has definitely enhanced the status of Charter law. And last but not least, the practice of the Organization, the interpretation given by the States Parties, and the organs of the Organization, including the ICJ, have largely contributed to the development of the Organization and the supremacy of Charter law in the world. It has largely confirmed the statement of the Court in the Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) in 1949: the Organization 'is at present the supreme type of international organization' (at 179).

77 There is no serious disagreement today on all these issues. Consensus has grown over the years, in particular on the issue of *ius cogens*. But does this general agreement amount to endorsement of the qualification of 'constitution of the international community'?

78 The dual nature of constituent acts of international organizations appears to provide an adequate framework of analysis, in particular as regards what has been described as the 'organic growth' of international institutions and the interpretation of their constitutions. The supremacy of the Charter in international law, and the reflection of the supreme position of the UN, is not in question and does add a major specificity to the Charter, compared with the 'constitutions' of other international organizations. But most legal issues boil down to striking the right balance between the two natures of the Charter, compact or constitution. The qualification 'constitution of the international community' either begs the question and, as such, is not an adequate reflection of the present state of the law, or is unnecessary to answer the legal questions relating to the interpretation or the implementation of the Charter. But that does not dispose of the political question.

3. The Political Question

79 The question addressed by the protagonists of the 'constitution' theory is basically one of constitutional law, ie a political question. The constituent nature of the instrument is not in debate. The question is that of the 'constitution of the international community'.

80 The question presupposes a definition of the 'international community'; attempts to this day have not been very convincing. As the argument goes, the scope of the international community comprises States, but also other actors. For instance, the report of 7 June 2004 entitled We the Peoples: Civil Society, the United Nations and Global Governance ('Cardoso Report'), refers directly to the first words of the Preamble. Interestingly, the Cardoso Report does not equate civil society with non-governmental organizations, such as those mentioned in Art. 71 UN Charter. The scope of the civil society extends to all associations of citizens, mass organizations, trade unions, religious organizations, etc. The ambit is generous, but raises problems of representation and of legitimacy.

81 It has been proposed that civil society be considered represented by nation-States. But such a view amounts to reverting to the 'international community of States'.

82 A more generally accepted view includes in the 'international community' all legal subjects of international law, ie States, international organizations, peoples and minorities, belligerent parties, but also individuals as entitled to respect of human rights or bound by *ius cogens* obligations or

Security Council decisions. The problem is that, short of sovereignty, legal personality is conferred by international law for specific purposes (cf *Reparation for Injuries suffered in the Service of the United Nations [Advisory Opinion]*). A collection of legal subjects endowed with very diverse rights and obligations does not constitute a community, much less the political foundation of a constitution.

83 Whatever the definition proposed, it amounts, at best, to the vague outline of an inchoate legal personality, devoid of identifiable organs with a juridical capacity in international law.

84 The expression 'constitution' refers to the constitutional movement throughout the years, starting with a charter, the Magna Carta, and illustrated in particular by the development of British constitutional practice, the American Constitution of 1787, the French *'Déclaration des Droits de l'Homme'* of 1789, the German constitutional debate of the 19th century, etc. It supposes a strong popular consensus on principles and purposes across the board; fair representation of the citizens concerned; checks and balances within the constitutional framework; and rule of law. These ingredients have been diversely termed and mitigated, but are the essence of what is considered a constitution today.

85 The UN is still far from passing the test and there is no clear indication that the international community is coming closer towards qualifying. Principles and purposes were stated in San Francisco. A basic consensus was then reached; but since, there is no clear measure of agreement as to the measure of these obligations in such fundamental fields as human rights or the interdiction of the threat or use of force.

86 Fair representation in the organs of the Organization is hardly convincing. Attempts to reform Security Council membership have been bogged down despite lip service to the principle. The General Assembly takes its decisions by majority vote. But its majority can certainly not be considered representative by the basic yardstick of democracy, ie one man, one vote. The functional distribution of powers among the principle organs of the Organization in no way amounts to checks and balances according to democratic theory. Institutional accountability is weak. Rule of law is minimal, with no compulsory adjudication. There are good reasons for all these features, but they do not add up to a constitution in the traditional meaning of the expression.

87 The qualification 'constitution of the international community' appears mainly as a political assertion, an act of faith, devoid of legal implications and consequences. As such, it may well be helpful to indicate the direction that the international community should take. It might also be counterproductive, as demonstrated by the rejection of the draft European constitution. The argument developed in Europe at the time fuelled resentment in public opinion and led to a negative outcome.

88 Whatever the merits of the arguments for and against, the debate seems largely semantic. The delegations meeting in San Francisco were well inspired to choose the denomination 'Charter'. The expression does refer to a historical process and reflects a democratic ideal; but it stops short of wishful thinking.

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