Specialized Rules of Treaty Interpretation: International Organizations
Bröllmann, C.M.

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
ACIL RESEARCH PAPER NO 2012-01

Specialized Rules Of Treaty Interpretation:
International Organizations

Catherine Brölmann

SPECIALIZED RULES OF TREATY INTERPRETATION: INTERNATIONAL ORGANIZATIONS

CATHERINE BRÖLMANN

INTRODUCTION

International law has generally treated questions of the legal personality and legal powers of international organizations (IOs) as a distinct subject—international institutional law.¹ But IOs, whatever their form or function, will also regularly trigger questions of treaty law and practice.² Most (but not all³) IOs are created by treaty, and that ‘constituent instrument’ provides the necessary starting point for delimiting the IO’s functions and competences. This chapter addresses treaty interpretation in the IO context, with particular attention to interpreting the founding or constitutive treaties of international organizations.

The choice of topic for this chapter is premised on the idea that not all interpretive rules are the same for all treaties. This is a well-tried proposition. As early as 1930 Arnold McNair recommended that ‘we free ourselves from the traditional notion that the instrument known as the treaty is governed by a single set of rules,’⁴ grouping constitutive treaties with dispositive treaties under the heading of what would now be termed ‘objective regimes’.⁵ More recently, Joseph Weiler called for a ‘re-examination of

² In addition to interpretation issues, IO constituent instruments may also trigger treaty law questions as to who can consent to that instrument; whether and how reservations or amendments can be made to it; and what processes exist for parties to withdraw from the founding treaty or terminate the IO itself.
³ Klabbers (n 1) 9-10 (noting how the UN Children’s Fund (UNICEF) was created by a UN General Assembly resolution, while the IO status of other entities, like the Organization on Security and Cooperation in Europe (OSCE), remains unclear).
⁴ McNair, ‘The Function and the Differing Legal Character of Treaties’ (1930) 11 BYBIL 100, 118.
⁵ Objective regimes are dealt with in detail in Chapter 13 of this volume.
treaty interpretation’ in particular, and proposed identifying and applying different
hermeneutics to different treaty regimes.\(^6\)

This recent interest in different canons of treaty interpretation hinges on
distinguishing interpretative practices for different areas of substantive law, for example
investment treaties, or human rights treaties.\(^7\) Constitutive treaties of IOs may be set
apart as ‘treaties creating organizations’, à la Arnold McNair in his early article, or as
belonging to the category of ‘law-making treaties’.\(^8\) But it must be recalled that they are,
beyond these divisions, a special category in their own right. IOs are to some extent
separate and ‘internal’ legal orders, so that interpretation of their founding texts can be
said to take place at the cutting edge of treaty law and institutional law.

Is such differentiation accommodated by the interpretative framework set out in
Articles 31-33 of the 1969 Vienna Convention on the Law of Treaties (VCLT)? On the one
hand, a case can be made that constituent treaties are exceptional, warranting a
separate interpretative framework. As discussed below, this position is bolstered by the
decisions of the International Court of Justice (ICJ), and of the Court of Justice of the
European Union (CJEU), which has developed a ‘distinct’ teleological approach for
interpreting EU Treaties in lieu of the VCLT’s more textual orientation.\(^9\) On the other
hand, some constituent treaties explicitly disavow a special approach. The World Trade
Organization (WTO)’s Dispute Settlement Understanding, for example, anticipates that
any clarification of the WTO’s constituent agreements will be done ‘in accordance with
the customary rules of interpretation of public international law’.\(^10\) Moreover, the VCLT
framework itself is famously broad, subsidiary and not very hierarchically structured.\(^11\) As


\(^7\) Issues of human rights treaty interpretation are discussed in Chapter 21 of this volume.

\(^8\) ‘Law-making treaties’ (\textit{traités- loi}) involve ‘a series of generalized, and not particularly reciprocal, statements of standards, norms, rules, rights and benefits which the contracting parties . . .
postulate’ and may be contrasted with ‘contractual treaties’ (\textit{traités–contrat}), which involve ‘a series of reciprocally operating rights, duties and benefits, the treaty being more or less synallagmatic’; law-making

\(^9\) The \textit{WTO} Dispute Settlement Understanding, for example, anticipates that

\(^10\) Chapter 19 addresses the VCLT’s general rules of treaty interpretation. Such interpretation is frequently
described as ‘an art not an exact science’. Cf eg P Merkouris, ‘Interpretation is a Science, is an Art, is a

\(^11\) Chapter 19 addresses the VCLT’s general rules of treaty interpretation. Such interpretation is frequently
described as ‘an art not an exact science’. Cf eg P Merkouris, ‘Interpretation is a Science, is an Art, is a

Science’ in M Fitzmaurice and others (eds), \textit{Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on} (Martinus Nijhoff, Leiden 2010) 8-12.
a result, it may be best to approach treaty interpretation in this context, not as a separate regime, but rather as a version of the VCLT framework to which additional or supplementary approaches have emerged in light of the ‘special’ characteristics that these constitutive instruments possess.

This chapter addresses treaty interpretation in the IO context in two parts. Part I examines the interpretation of constitutive treaties and IO secondary rules. Part II looks at the role of organizations as treaty interpreters. Examples are drawn predominantly from the UN context and to a lesser degree the European Union. These organizations and their constitutive treaties, especially the UN Charter, have received extensive and articulate interpretations. They may also be generally representative of similar treaties, for which concrete examples are less accessible. The ICJ, moreover, has issued several seminal decisions in this field (eg the 1949 Reparation and the 1996 WHO Legality of Nuclear Weapons cases) which reflect the current state of the law and count as authoritative statements on the nature of IO treaties.

I. INTERPRETATION OF CONSTITUTIVE TREATIES

What is a constitutive treaty? Generally, it is a treaty among States that establishes an institution with one or more organs with a will distinct from that of those States creating it. Thus, the constitutive treaty establishes the IO, and in doing so, details its functions and competences. But a constitutive treaty can also create substantive rights or obligations for States parties. Thus, the UN Charter constitutes the UN, but also binds parties to specific conduct (eg Article 2(4)’s prohibition on the unlawful use of force).

The interpretation of constitutive treaties is quite important. It is the primary legal exercise for determining the IO’s competences. Thus, it often touches upon – in political terms – the degree to which the IO’s member States are ‘Masters of the Treaty’.

For a long time after the dawn of IOs in the second half of the nineteenth century, IOs were perceived as open platforms and functional vehicles for State action. They possessed little to no autonomy vis-à-vis their member States, nor did they maintain ‘external relations’. The interpretation of a founding treaty for the purpose of establishing the organization’s competences was thus not a regular concern. Organizations themselves were very much looked at as a ‘contractual agreement’

12 Accord Gardiner (n 9) 113.
13 Although on occasion an IO can be a member of another IO; thus, the EU is a member of the WTO and the Food and Agriculture Organization.
between States, as Otto von Gierke wrote in 1868 about the Administrative Unions of his time.\textsuperscript{14}

But the rise of IOs in the UN era led to a dramatic change in outlook on constitutive treaties. As IOs became more independent from their Member States, the treaties creating them garnered special attention.

A. Constitutive Treaties as a Separate Category

Today, VCLT Article 5 affirms that constitutive treaties are a distinct class: ‘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’ (emphasis added). Thus, the VCLT applies to constitutive treaties by default; reserving to the IO the ability to have its rules govern the treaty creating it. In practice, this reservation clause has been focused on the IO’s rules involving consent to be bound, reservations, amendments, etc.\textsuperscript{15} But nothing in Article 5 precludes it from applying to interpretation where an IO (as in the aforementioned WTO case) specifies one or more interpretative rules for its founding treaty.

Underlying this distinctive treatment of constitutive treaties is the notion that they have a special nature. They are ‘self-contained’, albeit not in the traditional sense of a particular area of substantive law or \textit{lex specialis},\textsuperscript{16} but rather as a semi-independent or ‘internal’ legal order based on specific institutional rules. Constitutive treaties may even be seen as having a ‘constitutional’\textsuperscript{17} function, binding member States to a set of coherent ‘internal’ laws on the IO’s competences, functions and goals.

---


\textsuperscript{15} Article 5’s application to treaties ‘adopted within’ an IO may be less relevant as a separate category. The practice of big ‘open’ IOs on matters such as the text’s adoption does not differ much from its adoption in an ad hoc diplomatic conference organized by the IO. Cf DH Anderson, ‘Article 5 Convention of 1969’ in O Corten & P Klein (eds), \textit{The Vienna Conventions on the Law of Treaties} (OUP, Oxford 2011) vol I, 94-95.


\textsuperscript{17} Although the ‘constitutional’ aspect of treaties constituting IOs may explain their distinct treatment, this chapter does not engage with the (rich) debate on possible ‘constitutional’ features of treaty regimes and constitutional functions for the international community. On that subject cf eg J Dunoff and J Trachtman, \textit{Ruling the World? Constitutionalism, International Law and Global Governance} (CUP, Cambridge 2010); J Klabbers, A Peters and G Ulfstein, \textit{The Constitutionalization of International Law} (OUP, Oxford 2009).
Judge Alvarez’s dissenting opinion in the ICJ’s *Genocide* case emphasized the institutional character of IO constitutive treaties:

[…] the new international law, so far as concerns multilateral conventions of a special character […] includes […] those which seek to develop world international organization or to establish regional organizations […]

Alvarez went on to argue that such treaties should not be linked to

The preparatory work which preceded them; they are distinct from that work and have acquired a life of their own . . . \(^{18}\)

Some years later, a majority of the ICJ specifically referred to the ‘special’ nature of constitutive treaties:

On 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 recognised that the Charter is a multilateral treaty, albeit a treaty having certain *special characteristics*.\(^{19}\)

Nor did the VCLT change the ICJ’s views. In a landmark ruling in response to a request of the World Health Organization (WHO) for an Advisory Opinion on the legality of the use of nuclear weapons, the Court emphasized that constitutive treaties are hybrid instruments, combining a multilateral treaty with a self-contained or ‘institutional’ aspect:

From a formal standpoint, the constitutive instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply. [...] But the constitutive 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 realising 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*.\(^{20}\)

---


\(^{20}\) *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Request by WHO) (Advisory Opinion) [1996] ICJ Rep 66, 74-75 ['WHO Legality Case'].
B. Specialized Rules of Interpretation

Conceptualizing founding treaties as a separate treaty category has, in turn, made room for a specialized interpretive practice. In the same WHO-Legality Case, the Court pointed out that

 [...] 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 constitutive treaties.21

What sort of ‘special attention’ do constitutive treaties receive? Traditionally, treaty interpretation accords considerable weight to the aspect of consent underlying the treaty. Hence, VCLT Articles 31 and 32 emphasize a textual approach, whether alone or in concert with an ‘intentional’ approach; a similar method may be gleaned from the ICJ’s practice. Moreover, although part of the VCLT rule, there is generally less concern for ‘object and purpose’ as a tool to establish the text’s meaning. In contrast, the interpretation of constitutive treaties appears generally inspired by the principle of effectiveness, and by an approach along the lines of Alvarez’ dissenting opinion (now en vogue for ‘objective regimes’), namely, to conceptually separate the treaty from the regime it creates.

Accordingly, we find two trends in the interpretation of constitutive treaties that stand apart from the standard VCLT approaches; (i) a ‘teleological approach’ to the

---

21 Ibid (emphasis added).
22 Cf eg Anglo-Iranian Oil Co (United Kingdom v Iran) (Judgement) [1952] ICJ Rep 104 (‘[The Court] must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention [of the Parties]’). For analysis of the textual and ‘subjective’ approach in ICJ jurisprudence, see S Torres Bernádez, ‘Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties’ in G Hafner and others (eds), Liber Amicorum Professor Seidl-Hohenvelden (Martinus Nijhoff, Leiden 1998) 721-748.
23 Cf VCLT Arts 31-33 and identical language found in Articles 31-33 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations [1986] 25 ILM 543 ['1986 VCLT']. The ICJ applied the ‘object and purpose test’ in a moderate form, eg, in The Ambatielos Claim (Greece v United Kingdom) [1952] ICJ Rep 28, 45; cf I Sinclair, The Vienna Convention on the Law of Treaties (2nd edn MUP, Manchester 1984) 131 (‘there is also the risk that the placing of undue emphasis on the “object and purpose” of a treaty will encourage teleological methods of interpretation’).
25 Alvarez (n 18); see also Territorial Dispute (Libyan Arab Jamahiriya v Chad) [1994] ICJ Rep 6 [72]-[73].
26 T Sato, Evolving Constitutions of International Organizations (Brill, Dordrecht 1996) esp 41-159 (including all ICJ cases involving constitutive instruments through 1982). Sato’s conclusions are more cautious than earlier ones by Denis Simon. Cf D Simon, L’interprétation judiciaire des traités d’organisations internationales: morphologie des conventions et fonction juridictionnelle (Pedone, Paris 1981) 194
text, similar to traditions in national law of statutory interpretation in an organic, constitutional context; and (ii) a particular importance attached to the ‘practice of the organization’ as opposed to the practice of the original treaty parties.

1. The Telos of the Treaty and the Organization’s Function as an Interpretive Tool

Some terminological distinctions at this point are helpful. According to VCLT Article 31, the ‘object and purpose’ is used to elucidate a textual approach for discerning the ‘ordinary meaning’ to be given to a treaty’s terms.\(^{27}\) This is not quite the same as a ‘teleological approach’ which in its classic sense is a general interpretive approach, taking the treaty’s objective as a guiding principle for interpretation of the text. In addition, there is a third, ‘evolutionary’ or ‘living instrument’ interpretative approach, which is different in that it takes into account the social context and may even necessitate reformulation of the original object and purpose.\(^{28}\) All three approaches play a role in interpreting constitutive treaties, but the teleological approach is most prominent.

In some cases, a constitutive treaty text may be sufficiently clear that a textual approach is employed. The ICJ, for example, did so in the \textit{Conditions of Admission} and \textit{IMCO} cases.\(^{29}\) But where the text is not sufficiently clear, the interpreter must decide on a guiding principle for further interpretation. The principle of \textit{in dubio mitius} (favoring interpretations protecting the liberty of the third party or the sovereignty of individual States) is familiar from the context of ‘contractual treaties’ (\textit{traités–contrat}) and domestic contract law. Indeed, when the legal context suggests the contractual element of the constitutive instrument deserves priority – eg in contentious cases in which acceptance of the Court’s compulsory jurisdiction is at issue\(^{30}\) – the Court has adhered to the traditional rules for treaty interpretation and adopted a fairly conservative

\footnotesize{(‘l’interprétation jurisdictionelle des traités constitutifs tend effectivement priviléger le développement des finalités institutionelles’); see also CE Amerasinghe, \textit{Principles of the International Law of International Organizations} (2\(^{nd}\) edn CUP, Cambridge 2005) 24-65.\(^{27}\) Gardiner (n 9) 190-191.\(^{29}\) CM Brölmann, ‘Limits to the Treaty Paradigm’ in M Craven & M Fitzmaurice (eds), \textit{Interrogating the Treaty: Essays in the Contemporary Law of Treaties} (Wolf Legal Publishers, Nijmegen 2005) 28-39.\(^{29}\) \textit{Conditions for Admission of a State to Membership in the United Nations} (Advisory Opinion) [1948] ICJ Rep 48, 63. In the \textit{IMCO} case, the ICJ interpreted ‘largest ship-owning nations’ to be a function of registered tonnage based on the treaty text, its drafting history and maritime usage generally. \textit{Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization} (Advisory Opinion) [1960] ICJ Rep 23. In doing so, the Court endorsed two ‘flags of convenience’ States falling under the interpreted term, even though from a teleological stance their participation may have been counterproductive to IMCO’s purpose of improving safety in shipping.\(^{30}\) Rosenne (n 8) 234 (including case law references).}
approach.\textsuperscript{31} But more often when it comes to constitutive treaties, \textit{in dubio mitius} plays little role.\textsuperscript{32} In its place, interpreters rely on the principle of \textit{effet utile} or effectiveness (sometimes called ‘functionality’).\textsuperscript{33} And when effectiveness is the guiding principle in the choice of interpretive methods, it generally brings on a teleological approach.

At the ICJ, the \textit{Reparation Case}\textsuperscript{34}; the \textit{Effects of Awards} Case\textsuperscript{35}; and the 1971 \textit{Namibia} Opinion\textsuperscript{36} are all instances where there was little attention to the ‘intentions’ of the treaty parties, while the degree of teleological reasoning in interpreting the UN Charter exceeded that of traditional interpretive exercises.\textsuperscript{37} In all three cases, moreover, the interpretation involved UN competence, suggesting that a teleological approach applies whenever the interpretation of the constitutive instrument is aimed at determining the competences of the IO, and thus moves within an institutional discourse.\textsuperscript{38} In such cases, it appears the Court generally departs from the traditional framework, ‘proceed[ing] directly to an interpretation of the constitutive instrument as it stands at the time of the interpretation’,\textsuperscript{39} with a corresponding disinterest for the intention of the parties and the \textit{travaux préparatoires.}\textsuperscript{40}

\begin{flushright}
\textsuperscript{31} Cf \textit{Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Jurisdiction and Admissibility)} [1984] ICJ Rep 392 [24]-[42] (interpreting ICJ Statute art 36(5)).
\textsuperscript{32} J Kokott, ‘States, Sovereign Equality, in R Wolfrum (ed), \textit{Max Planck Encyclopedia of Public International Law} (OUP, Oxford 2008), online at \textless www.mpepil.com \textgreater [26].
\textsuperscript{33} Cf \textit{Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt} (Advisory Opinion) [1980] ICJ Rep 73, 96 (emphasizing ‘their [of the host state and the organization] clear obligation to cooperate in good faith to promote the objectives and purposes of the Organization’); cf Sato (n 26) 154.
\textsuperscript{35} \textit{Effect of Awards of Compensation made by the United Nations Administrative Tribunal} [1954] ICJ Rep 53 (relying on the teleological approach for the competence of the UNGA to establish the Administrative Tribunal, but on the textual approach for determining the judicial nature of the Tribunal itself).
\textsuperscript{36} \textit{Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa)} (Advisory Opinion) [1971] ICJ Rep 16.
\textsuperscript{37} Not everyone endorsed this approach; Rosenne and Sinclair both criticized it. Rosenne (n 8) 237 (seeing teleological approach for constitutive treaties as potentially ‘unproductive in the political sense and [...] prejudicial to the authority of the Court’); Sinclair (n 23) 131.
\textsuperscript{38} Here, the doctrine of ‘implied powers’ holds a prominent place. Cf eg \textit{Reparation Case} (n 34) 182; \textit{WHO Legality} Case (n 20) 79. For examples in which the contractual element of a constitutive treaty is dominant, and the classic interpretive rules are applied, see note 29 and accompanying text.
\textsuperscript{39} Rosenne (n 8) 234; cf ibid 195 (finding, with regard to ICJ interpretation of the UN Charter, that there is ‘little doubt that adherence to “traditional” legal concepts of the law of treaties is not a prominent feature of the interpretation of those provisions by the Court, although it is not displaced entirely’).
\textsuperscript{40} For in-depth studies of the interpretation of IO constitutions, see Sato (n 26) (re the ICJ); Rosenne (n 8) 234; Simon (n 26). A seminal treatise is the chapter on ‘Interpretation of Constitutions’ in E Lauterpacht, ‘The Development of the Law of International Organization by the Decisions of International Tribunals’ (1976/IV) 135 RcD 379, 414-465.
\end{flushright}
Beyond recognizing an IO’s implied powers, the ICJ’s Reparation Case is the canonical example of teleological treaty interpretation, explicitly inspired by the principle of effectiveness. The Court, without precedent of any of the new ‘constitutional’ perspectives on IO constitutive treaties, attributed legal personality to the organization ‘by some unorthodox [viz teleological] reasoning’,⁴¹ even though it could have reached the same conclusion along more traditional lines, using the travaux préparatoires of the Charter. In fact, part of the San Francisco Conference had considered international legal personality to be implied by the Charter as a whole.⁴²

The other landmark decision in this respect is the 1996 WHO Legality Case, where the ICJ seemed to take its interpretive exercise one step beyond a regular (even if teleological) treaty interpretation. After it determined the functions of the Organization by reference to the classic law of treaties canon,⁴³ the Court moved into a teleological discourse, proceeding from the functions of the organization, rather than working towards establishing them. This included not only references to ‘the practice followed by the Organization’,⁴⁴ but also an – unprecedented – constitutional or ‘systemic approach’ in which it relied on an interpretation of the UN Charter reference to ‘specialized agency’ as the basis for limiting its reading of the WHO Constitution:

As these provisions [in UN Charter Article 63] demonstrate, the Charter of the United Nations laid the basis of a ‘system’ designed to organise international co-operation in a coherent fashion [...] It follows [...] that the WHO Constitution can only be interpreted, as far as the powers conferred upon that Organization are concerned, by taking due account [...] also of the logic of the overall system contemplated by the Charter [...] Any other conclusion would render virtually meaningless the notion of a specialised agency.⁴⁵

2. Practice of the Organization as an Interpretive Tool

A second feature of constitutive treaty interpretation (especially by the ICJ) involves referencing ‘the practice of the organization’.⁴⁶ Even in decisions which emphatically rely on traditional methods of interpretation, there seems to be additional recourse to

---

⁴¹ Rosenne (n 8) 238. For the Court’s reasoning, see Reparation Case (n 34) 179.
⁴² Rosenne (n 8) 238; 12 UNCIO 703, 710 (Committee no IV/2 of San Francisco Conference of opinion that no explicit reference to UN international personality was needed as ‘in effect, it will be determined implicitly from the provisions of the Charter taken as a whole’).
⁴³ WHO Legality Case (n 20) 75-76;
⁴⁴ Ibid 76 [21]; see also infra note 48 and accompanying text.
⁴⁵ WHO Legality Case (n 20) 79-80 [26] (emphasis added). For more on ‘functional decentralisation’ see Schermers and Blokker (n 1) [1692].
⁴⁶ Cf Certain Expenses Case (n 19) 157; Namibia Case (n 36) 22 [22]; see also Sato (n 26) 41-159.
consistent practice by the IO itself. In the WHO Legality case, the ICJ reaffirmed that an organization’s constitutive treaty was to be interpreted in accordance with their ordinary meaning, in their context and in the light of the object and purpose of the [...] Constitution, as well as of the practice followed by the Organization. The reason is precisely that the IO’s own application of its constitutive treaty should be attributed to the organization itself, independent of the ‘will’ or intention of the contracting parties. The ‘practice of the organization’ is thus added to the law of treaties armamentarium, while the ‘subsequent practice’ of the parties mentioned in VCLT Article 31 is altogether absent in the ICJ’s opinions involving interpretation of IO constitutions. But this practice of the organization is not to be confused with the ‘subsequent practice’ of the contracting parties from which their anticipatory consent to the treaty’s interpretation can be construed. In other words, IO practice cannot be put on the same footing as the interpretive tool envisaged by VCLT Article 31(3)(b). The reason is precisely that the IO’s own application of its constitutive treaty should be attributed to the organization itself, independent of the ‘will’ or intention of the contracting parties. The ‘practice of the organization’ is thus added to the law of treaties armamentarium, while the ‘subsequent practice’ of the parties mentioned in VCLT Article 31 is altogether absent in the ICJ’s opinions involving interpretation of IO constitutions.

On occasion, moreover, there have been explicit interpretative references to the practice of a particular IO organ rather than to the practice of the organization as such. In such cases, the practice of organs may be considered to have the same legal effect as that of the IO on the principle that organs represent the international legal person in its entirety. 1986 VCLT Article 2(1) references ‘the established practice of the organization’ as a form of ‘rules of the organization’, but leaves the internal division of IO

Footnotes:
48 WHO Legality Case (n 20) 76 [21] (emphasis added); note that both in the 1986 VCLT (UN Doc. A/CONF.129/15 - in Art 2(1)) and in the 2001 ILC Draft Articles on the Responsibility of IOs (UN Doc. A/66/10 – in Art 2(b)) the ‘rules of the organization’ are defined as comprising ‘the constituent instruments, ...and...established practice of the organization’.
49 Article 31(3)(b) of both the 1969 and 1986 VCLTs requires interpreters to take account of ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’. See discussion of this provision supra Chapter 19 (Part II.A.2).
51 There is a similar dearth of (substantive) references to the intention of the parties. Cf eg Lauterpacht (n 40) 438 ff.
52 Analogous reasoning justifies extending an IO’s treaty-making capacity to its organs—such as the UN’s treaty-making capacity extending to the UN High Commissioner for Refugees.
53 1986 VCLT art 2(1)[j] (‘rules of the organization’ means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.’).
competences entirely to the institutional discretion of the organization. From the perspective of general international law and the law of treaties such decentralization within the organization clearly removes the IO’s member States one step further from control of the IO ‘practice’, which may subsequently shape the interpretation of the treaty to which they originally became a party.

Put differently, relying on the practice of IO organs adds another layer between the general law of treaties and the constitutive treaty to be interpreted. Judge Spender noted this fact in his Certain Expenses dissent:

I find difficulty in accepting the proposition that a practice pursued by an organ of the United Nations may be equated with the subsequent conduct of parties to a bilateral agreement and thus afford evidence of intention of the parties to the Charter. 54

Nonetheless, the Court reaffirmed the validity of employing the practice of an IO organ (in casu the UN’s Security Council) as an interpretive tool in the Namibia Opinion. 55

The role of the ‘practice of the organization’ in treaty interpretation may be further complicated if such practice plays dual roles. At times, IO practice might be a tool to establish the correct interpretation of the treaty text; at other times, the IO practice itself might be an interpretation of that text. This distinction between interpretation and application is, however, often fuzzy. The premise that ‘when the meaning of the treaty is clear, it is “applied”, not “interpreted”’; 56 has been convincingly questioned with regard to treaties in general and seems especially relevant with respect to organizations. 57 A broad approach appears warranted, where many instances of application can be regarded as implicit acts of interpretation. 58 This is all the more so since interpretation is a key method for IOs to change the rules of the organization when formal amendment of the constitutive treaty is not feasible. 59

---

54 Certain Expenses Case (n 19) 189 (italics in the original).
55 Namibia Case (n 36) 22 [22].
56 A McNair, The Law of Treaties (2nd edn OUP, Oxford 1961) 365 n1; cf also M Milanovic, ‘The ICJ and Evolutionary Treaty Interpretation’ (14 July 2009) EJIL Talk!, at <www.ejiltalk.org/the-icj-and-evolutionary-treaty-interpretation> (interpretation is ‘the activity of establishing the linguistic or semantic meaning of a text; [application is] the activity of translating that text into workable legal rules to be applied in a given case’).
57 Cf eg Gardiner (n 9) 25–29; supra Chapter 19 (‘Preliminary Considerations’).
58 See Schermers and Blokker (n 1) [1155]–[1185].
C. Constitutive Treaties (in General)

For reasons noted at the outset, the discussion so far has had a UN focus. But interpretation of constitutive treaties other than the UN Charter generally shows the same pattern. Special attention, however, should be given to interpretations of the treaties establishing the EU (including the European Community) by the Court of Justice of the European Union (CJEU). These do not differ substantively from the ICJ’s interpretive exercises, even though the CJEU is meant to operate only within the – comparatively ‘constitutional’ – EU legal order.

Although the CJEU has not rejected the VCLT framework, it has tended to cite only the first paragraph of Article 31. Moreover, in its (sparse) references to the rules of interpretation as part of the general law of treaties, the CJEU can be seen to employ a large degree of teleological reasoning coupled with a reluctance to use the *travaux préparatoires* as a supplementary means of interpretation. In the same vein, the CJEU does not generally recognize subsequent practice of the treaty parties as a tool for interpreting the EU Treaties. As a further sign of its self-contained outlook, the European Court has been known to perform, as one commentator put it, a ‘Baron von Münchhausen trick’ relying on the object and purpose test of VCLT Article 31(1) in its interpretation of an EU constitutive treaty to underscore the special character of that treaty, and then using its own case law as ‘context’ in the sense of VCLT Article 31(2) to substantiate the particular character of that EU treaty as opposed to another treaty concluded among EU Member States.

Taken together, these patterns show constitutive treaty interpretation moving out of a contractual framework into an institutional one – and thus out of the law of

---

60 See eg Amerasinghe (n 26) 24-65; Schermers & Blokker (n 1) [1346]-[1350].
61 The CJEU was previously called the European Court of Justice (ECJ).
62 The CJEU’s interpretations address, however, both the founding treaties for the EU as well as treaties between the EU and non-member States. See Gardiner (n 9) 122-124.
63 Ibid.
65 The Court made this point explicitly in Case C-327/91 France v Commission [1994] ECR I-3641 (point 36) and Opinion 1/94 [1994] ECR I-5267 (point 52 and 61). Contrary to the ICJ, however, the CJEU does not seem to accept (as yet) the subsequent practice of Community institutions for purposes of interpretation. See Kuijper 1999 (n 64) especially 9-10.
67 Kuijper 1999 (n 64) 2-4.
treaties discourse into the institutional law discourse – in which ‘treaty parties’ become ‘member States’. Nor is this move limited to international tribunals. Consider a (lesser known) case before the Netherlands’ Council of State by the Dutch Seamen’s Welfare Foundation, addressing the interpretation of the constitutive treaty of the International Labour Organization (ILO). The Foundation argued that ‘ratification’ of an ILO treaty by ILO member States pursuant to Article 19(5) of the ILO Constitution implied that the previous stage of ‘adoption’ by the ILO Plenary Conference (per ILO Constitution Article 19(1)) equalled ‘signature’ in terms of the law of treaties. As such, the Netherlands as an ILO member had incurred a legal obligation under VCLT Article 1868 not to defeat the object and purpose of ILO Treaty No 163 (concerning Seafarers’ Welfare) after its ‘adoption’ in the ILO Plenary Conference – an obligation the Netherlands was claimed to have breached by terminating a subsidy to the Foundation. The Council of State, however, did not adopt this contractual view of ILO treaty-making. Instead, it considered the adoption of ILO Convention No 163 to be part of an institutional legal process, to which VCLT Article 18 did not apply.69

D. Interpretations of IO Secondary Law

The grey area between a contractual framework and an institutional framework for IO treaty interpretation is brought out even more by those rules that are the ‘secondary law’ of IOs. These are the normative acts of IOs, which derive their validity from the primary law of the organization, ie the constitutive treaties.70 Most IOs have organs which can take decisions binding on the organization (with ‘internal’ effect) or upon member States. Sometimes this competence is given to non-plenary organs, and sometimes the rules enacted by the organization are binding on a resolutive condition, such as the ‘standards’ adopted or amended by the Council in the International Civil Aviation Organization by a two-thirds majority.71 Comparable procedures for the

---

68 For a detailed discussion of VCLT Article 18 see supra Chapter 8 (Part II).
70 The scope of normative acts will differ from IO to IO, and will (largely) depend on ‘what the constituent treaty says’, but as Klabbers notes, a treaty may not be clear on what acts are authorized and unanticipated acts may emerge in practice. Klabbers (n 1) 178. Moreover, distinctions must be made between IO normative acts that are legally binding versus those that are not. Ibid 182.
71 Convention on International Civil Aviation (signed at Chicago 7 December 1944, entered into force 4 April 1947) 15 UNTS 295, arts 37, 54(1), 90.
enactment of ‘regulatory acts’ exist in the WHO (where law-making functions reside in the plenary organ) and in several other UN Specialized Agencies.\(^7\)\(^2\)

There has been some debate as to whether this growing body of rules\(^7\)\(^3\) is either (i) derivative (or ‘delegated’) treaty obligations for the IO’s member States – ie deriving from the constitutive treaty; or (ii) legislative acts by an organization simply binding its member States.\(^7\)\(^4\) Essentially the same question arises in asking if various systems of IO standard-setting are covered by existing categories of sources, or whether they constitute a new source of international law.\(^7\)\(^5\) Both views are defensible: on the one hand, the binding character of regulatory acts can be construed from an ex ante expression of consent on the part of States;\(^7\)\(^6\) on the other hand, their binding force can be traced to the competences of the decision-making organ itself.

The latter perspective is increasingly dominant among public international law scholars.\(^7\)\(^7\) The EU serves as an example of an organization which from the outset expressly had the legislative paradigm prevail for reasons of practical and doctrinal necessity: obligations stemming from EU law (Articles 288 and 289 of the Treaty on the Functioning of the European Union (TFEU)) are clearly set apart from obligations stemming from the EU’s founding treaties, or primary European law.


\(^7\)\(^4\) Compare M Fitzmaurice, ‘Modifications to the Principles of Consent in Relation to Certain Treaty Obligations’ (1997) ARIEL 275, 316-317 (adhering to the derivative view) with Alexandrowicz (n 72) 152 (on the regulatory acts of UN Specialised Agencies: ‘this is no doubt an extra-treaty process’).

\(^7\)\(^5\) Compare GM Danilenko, Law-Making in the International Community (Martinus Nijhoff, Boston 1993) 192 (‘they hardly qualify as new formal sources of general international law existing independently of a specific treaty arrangement’) with V Degan, Sources of International Law (Martinus Nijhoff, Boston 1997) 6 (considering ‘non-obligatory’ rules such as ICAO standards, to which, nevertheless, ‘the respective states almost invariably conform themselves’, as a possible newly emerging source of international law).

\(^7\)\(^6\) This was the ICJ’s approach to dealing with the conflict between the 1971 Montreal Convention and UN Security Council Resolution 748 – originating under the UN Charter – as a traditional case of conflicting treaties. Cf Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States) (Provisional Measures) [1992] ICJ Rep 126.

\(^7\)\(^7\) Cf C Tomuschat, ‘Obligations Arising for States Without or Against Their Will’ (1993) 241 RdC 195, 328 (‘An honest assessment of the new legal position created by the establishment of an international organization must find a different justification’).
Meanwhile, when it comes to IO secondary law in general, the interpretative practice differs from the practice relating to constitutive instruments. A principle favouring the ‘paramount importance of contextual interpretation’ exists, meaning that ‘legal acts always have to be construed by reference to and in accordance with the constitutive instrument of the organization’ and ‘in conformity with general international law binding on the international organization, especially rules of jus cogens.’ 78 Moreover, some scholars emphasize that, contrary to primary IO law (ie the constituent treaty), ‘interpretation according to the object and purpose, has to be referred to more cautiously [...] This is a result of the delegated character of secondary rules.’ 79 In the context of the EU ‘law-making’ done pursuant to authorities in EU Treaties, the very paradigm of ‘treaty interpretation’ has retreated into the background. 80

II. INTERPRETERS OF IO LAW

A. Organizations as Interpreters

The constitutive treaty and the secondary rules of an organization are interpreted first of all by IOs themselves. 81 In the context of the present chapter this excludes international ‘courts and tribunals’ (discussed separately below), but includes so-called treaty bodies, 82 so long as their activity is not limited to (semi-)judicial review of cases but also entails, inter alia, issuing general legal comments. Treaty bodies are created under a treaty and incorporated within an IO, even if the constitutive treaty itself did not envision them (eg the Committee on Economic, Social and Cultural Rights (CESCR) was

78 Benzing (n 73) [47]
80 Cf Kuijper 2011 (n 64) 268-270 (survey of recent CJEU practice).
81 O Schachter, ‘The UN Legal Order: An Overview’ in C Joyner (ed), The United Nations and International Law (CUP, Cambridge 1997) 3, 9-13; Roseanne (n 8) 241(with references); Sato (n 26) 161-226 (detailed survey analysing the legal effects of such interpretations); see also the discussion of ‘International Bureaucracies as Actors in Legal Discourse’ in I Venzke, The Practice of Interpretation and International Law: On the Semantic Authority of International Institutions in Communicative Law-making (OUP, Oxford 2012), Chapter III.A., which expounds how international institutions (comprising both international “bureaucracies” and “international courts”) have a large degree of semantic authority in the attribution of meaning to treaty texts.
82 For a discussion of treaty bodies and treaty regimes, see supra Chapter 17.
established by the States parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) rather than by the treaty itself\(^{83}\). The CESCR does produce General Comments, as does the Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR).\(^{84}\) This interpretive role of IOs is an expression of – in institutional rather than treaty terms – the IO’s \textit{compétence de la compétence}.\(^{85}\)

Traditionally, treaty parties interpreted their treaty, with additional interpretative tools such as ‘subsequent practice’ easily traced back to the original States parties’ consent. However, in the interpretation of IO functions and competences laid out in constitutive treaties, the role of the contracting parties seems to have moved to the background. States are simply less likely to unilaterally interpret constitutive instruments of treaties, although as the Dutch Seamen’s Welfare Foundation case suggests, States (or their organs) will still do so on occasion. States undoubtedly continue to auto-interpret substantive provisions of constitutive treaties (eg UN Charter Article 51 on self-defense; ICCPR Article 7’s prohibition on torture) irrespective of any interpretations of those provisions by the IO or its organs. But, for IO functions and competence, the IO drives the interpretative enterprise, as indicated by the fact that essentially all the ICJ’s cases involving interpretations of constitutive treaties came via advisory opinions – requested by the Organization – not inter-State contentious cases.

Having an organization interpreting the constitutive instrument by which it was created is, however, a phenomenon that has long served as a point of tension between treaty and institutional perspectives.\(^{86}\) From an institutional perspective, it makes sense that an IO would determine its own competences and test its own mandate by going back to its constitutive treaty. But, in a contractual framework, there is less support for the IO doing so in lieu of the contracting parties themselves, and the notion has virtually no place in the VCLT system.\(^{87}\) It is nonetheless now a generally accepted approach to IO law. Likewise, so-called treaty bodies also regularly engage in interpretation of ‘their’


\(^{86}\) EP Hexner, ‘Interpretation by Public International Organizations of their Basic Instruments’ (1959) 53 AJIL 341, 343 (‘the function of authoritative interpretation rests with the ordinary executive organs of these [Bretton Woods] institutions and not with any tribunal external to them’).

\(^{87}\) The one notable exception is VCLT Article 20 where, in requiring the competent IO organ to accept reservations to the IO’s constituent instrument (unless the treaty otherwise provides), IO organs presumably interpret their constituent instrument.
treaty. When done teleologically, this can spur a law-making process, as when the CESCR inferred a right to water from ICESCR Articles 11 and 12. In other instances, the body’s interpretation may generate controversy, as was the case in 1994 with the Human Rights Committee’s self-declared right to judge reservations to the ICCPR. 

In a well-known passage in the Certain Expenses case, the ICJ examined which IO organs had interpretive authority:

> In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. [...] As anticipated in 1945 therefore, each organ must, in the first place at least, determine its own jurisdiction.

Thus, when the question arises which organ(s) are competent to interpret the constituent instrument, it is in the first place the rules of the organization that determine this (as general international law is agnostic on this point).

In the case of the UN, both the Security Council and the General Assembly have claimed (and exercised) such authority. Famous examples include the Security Council’s interpretation of UN Charter Article 39’s ‘threat to the international peace’ provision to include situations within existing State borders, and the General Assembly’s claim, under the Uniting for Peace Resolution, to a role in furthering international peace and security, including the establishment of peace-keeping missions. If the International Criminal Tribunal for Yugoslavia (ICTY) is viewed not as a distinct IO, but as a subsidiary organ established by the UN Security Council pursuant to UN Charter Article 41, the notorious passage in the 1995 Tadic case (where the Tribunal assessed and approved of its own existence based on UNSC competence) is another case in point. Organs of other organizations, such as at the ILO or the Executive Directors of the International Monetary Fund, could claim similar interpretive authority.

---

88 CESC General Comment 15, E/C.12/2002/11.
89 UNCHR, ‘General Comment No. 24’ (4 November 1994) CCPR/C/21/Rev.1/Add.6; see also ‘Observations of the United States and the United Kingdom on General Comment 24’ (28 March 1995) UN Doc A/50/40.
90 Certain Expenses Case (n 19) 168 (emphasis added).
93 UNGA, ‘Uniting for Peace Resolution’ (3 November 1950) UN Doc A/RES/377 (V).
94 Prosecutor v Dusko Tadic a/k/a ‘Dule’ (Decision on the Defense Motion for the Interlocutory Appeal on Jurisdiction), International Criminal Tribunal for the former Yugoslavia, 2 October 1995 (Case No IT-94-1-AR72) [26]-[40].
Fund (IMF) and the International Bank for Reconstruction and Development (IBRD) have also produced relevant interpretations, generating subsequent adherence.\(^9\)

### B. (Semi-)Judicial interpretation

Although some courts are organs of an IO, it seems better to conceive of them as independent reviewers – and hence interpreters - of the application of legal rules in a constitutive treaty. Hence, in this chapter, international courts and tribunals are not considered ‘international organizations’, even if they are not domestic courts or stand-alone international tribunals, but rather bodies that institutionally belong to a particular organization (eg the ICJ serves as the UN’s principal judicial organ) or functional sphere (eg the European Court of Human Rights operates under the 1950 European Convention on Human Rights). Thus, in addition to the IO itself, these bodies exist to interpret constitutive treaties, most often the one that created them. In performing judicial dispute settlement, these courts can face interpretative questions on a treaty’s ‘operational’ or ‘substantive’ parts as well as on its ‘constituent’ parts. This chapter, however, only focuses on the later instances; as indicated above, cases involving disputes over the interpretation of the non-constitutive parts of the treaty are better approached under the VCLT’s general interpretative framework.

The act of interpreting an IO’s primary or secondary law is singled out and detached from the act of application whenever it is the subject of a declared difference of opinion or dispute. In these cases, the relevant choices of procedure, body and competence are governed (in principle) by the rules of the organization itself, notably those laid down in the constitutive instrument. Often a (semi-)judicial procedure is at issue.

Some constitutive treaties such as the UN Charter are silent about the competent interpretive authority in case of dispute. At the San Francisco Conference in 1944, the proposal to appoint the ICJ as the authoritative interpreter of the Charter was rejected.\(^9\) However, even without a formal appointment, the Court has subsequently (and logically) assumed a central role in the Charter’s interpretation. And that role has been generally accepted (witness the large number of cases). Formally, however, neither the request for

\(^9\) Amerasinghe (n 26) 25-26.
\(^9\) Cf Doc XII UNCIO 709; Certain Expenses Case (n 19) 168 (‘Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; [...] As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction’); Kunig (n 91) [7].
an advisory opinion to the Court, nor the outcome is binding, so other (diplomatic) means of resolving an interpretive dispute may always be sought.  

Some constitutive treaties do envisage a binding decision, whether by the ICJ (eg ILO Constitution Article 37) or an arbitral tribunal (eg UNESCO Constitution Article XIV). Other founding treaties provide for non-binding opinions by the ICJ or another tribunal, often as a last resort. An alternative mechanism, seen most often with international financial institutions (IFI), gives final and binding interpretative competence to the IFI’s supreme plenary organ.

CONCLUDING REMARKS:

A LAYERED EXERCISE IN INTERPRETATION

Interpretive practice vis-à-vis constitutive treaties (or the segments in these treaties which regulate the functioning of the organization rather than the behaviour of the states parties) can be said to differ notably from general treaty interpretation because of two features. First, special weight is given to the ‘object and purpose’ of the treaty by way of a general teleological approach to interpretation, rather than as a means to establish the text’s ‘ordinary meaning’ per VCLT Article 31. Second, special weight is also given to the subsequent practice of the organization. In contrast, classic interpretive methods that safeguard the State party’s ‘sovereign will’ – such as recourse to the travaux préparatoires, party intention, and the subsequent practice of treaty parties - seem to have faded into the background.

Arguably, these points of distinction are brought into the interpretive process by the extra layer of the IO legal order over the constituent treaty. Or, from a doctrinal perspective, these distinctions reflect a shift from a contractual (treaty) approach to constitutive treaties to an institutional perspective (or even ‘paradigm’). As a result, it is the IO, not the States parties, that ends up taking on any interpretative questions.

Interpretation of the rules of organizations begs a basic question that does not arise with other treaties, that is: whether treaty interpretation is even at issue, or if a

---

97 An assertion by one or more States parties of a right to intervene under ICJ Statute Article 63 when a (binding) interpretation is at issue would greatly complicate the ICJ’s interpretation of a constitutive treaty. As yet, however, that situation has not presented itself.

98 Eg IMF Articles of Agreement (adopted 22 July 1944, entered into force 27 December 1945) 2 UNTS 39, art XXIX(a). These variations and other provisions are mentioned in an insightful discussion by Amerasinghe (n 26) 26-32.
different interpretive exercise, viz the institutional law of a particular organization, should apply. In other words, are UN Security Council resolutions a form of treaty law or do they amount to ‘international legislation’? Was the 1999 new ‘strategic concept’ of NATO\textsuperscript{100} a (highly ‘evolutive’) interpretation of the 1949 North Atlantic Treaty or a redefinition of powers and competences by an Organization making use of its \textit{compétence de la compétence}? From a formal perspective, the answer to such questions determines the applicability of the law of treaties. And, in accordance with the focus of this book, this chapter has examined these issues from the perspective of \textit{treaty law} rather than that of institutional law.

Some time ago constitutive treaties were stated to be so fundamentally different that ‘it is deceptive to see in diplomatic and legal (including judicial) incidents concerning the constitutive instruments “precedents” for the general law of treaties, and \textit{vice versa}.’\textsuperscript{101} This perhaps over-emphasizes the special character of constitutive treaties. On a general note, we may conclude that the law of treaties is the primary legal tool for their interpretation. But, even so – arguably because of the IO’s semi-separated internal legal order – the receptiveness of constitutive treaties to the classic VCLT interpretative framework is somewhat limited. With the multiplication of levels of governance and loci of semantic authority in the world the mechanism of ‘constitutive interpretation’ is likely to become more prominent in the future.

\textbf{RECOMMENDED READING}


\footnotesize{\textsuperscript{99} Cf Gardiner (n 9) 113 (asking whether UNSC resolutions are subject to the Vienna rules or better treated as unilateral acts).
\textsuperscript{101} Rosenne (n 8) 257-258.}


