THE INTERPRETATION OF THE CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS

Arş. Gör. Berat Lale AKKUTAY*

ABSCTRACT

This article deals with the interpretation of the charters of international organizations. In the article the methods of interpretation stipulated in 1969 Vienna Convention on the Law of Treaties examined by emphasizing the importance of teleological interpretation.

KEYWORDS

International Organizations, Constitutional Treaties, Interpretation of Treaties, 1969 Vienna Convention on the Law of Treaties.

ULUSLARARASI ÖRGÜTLERİN KURUCU ANDLAŞMALARININ YORUMU

ÖZET

Bu makalede uluslararası örgütlerin kurucu andlaşmalarının yorumu konusu incelenmiştir. Makalede 1969 Viyana Andlaşmalar Hukuku Sözleşmesi hükümleri çerçevesinde sözü edilen yorum metodları amaçsal yorum yönteminin önemi vurgulanarak değerlendirilmektedir.

ANAHTAR KELİMELER

Uluslararası Örgütler, Kurucu Andlaşmalar, Uluslararası Andlaşmaların Yorumu, 1969 Viyana Andlaşmalar Hukuku Sözleşmesi.

* Gazi Üniversitesi Hukuk Fakültesi, Kamu Hukuku Bölümü (Devletler Umumi Hukuku), Araştırma Görevlisi.

Introduction

In order to keep up with the requirements of today's world charters should be considered as living instruments. Charters cannot be limited by the intentions of their drafters or the plain meanings given of the time that they had been created. In his own words Judge Alvarez stated that:

"...charters can be compared to ships which leave the yards in which they have been built, and sail away independently, no longer attached to the dockyard."[1]

Especially after the ratification of the Vienna Convention on the Law of Treaties[2] there has been a general move away from the leading method of constitutional interpretation based on the textual meaning.[3] Article 31 of the Convention attributes a significant value to the subsequent practice and the objects and purposes. The original intent of the parties is also another canon for the interpretative exercise.

In this paper it is aimed to evaluate the constitutional and contractual approaches to the charters of the international organizations, spot the participants who contribute to the interpretation process and examine the different canons of interpretation within the changing understanding of interpretative exercise.

1. Constitutionality of the charters

While arguing the interpretation of the charters of international organizations it is crucial to examine the features of the founding agreements. Multilateral treaties can be categorized as contractual and constitutional.

Under the traditional legal doctrine the treaties establishing the self-ruling entities like UN (United Nations) or GATT/WTO (General Agreement on Tar-

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1 *Reservations to the Convention on Genocide, Advisory Opinion*, ICJ Rep. 1951, p. 53.

2 Vienna Convention on the Law of Treaties, 1969, 8 I.L.M. 679.

3 N.D. White, The UN System: Toward International Justice, (Boulder: Lynne Rienner) (2002), p. 26.

iffs and Trade/ World Trade Organization) considered as "treaties" no different than contractual bilateral agreements.[4]

On the other hand some lawyers and interpreters have a tendency to accept charters as constitutions.[5] According to Mcnair the multilateral agreements creating international entities and general rules above the states have constitutional aspects.[6] Some constitutionalists like Petersmann support the international constitutionalism in order to strengthen the principle of rule of law in international organizations.[7]

In fact, charters have both contractual and constitutional features. When the contractual elements of a treaty are considered, such as the termination or modification, the ordinary rules of interpretation must be applied because of the equal status of the parties. However when the normative side of the treaty is considered the similarity only can be found in the domestic public law, eg., the administrative and the constitutional law of the member states. Thus the different rules of interpretation must be applied not only to the domestic constitutions but also to the charters of the international organizations.[8]

Today, charter interpreters are in favour of the constitutional interpretation methods, on the basis of Vienna Convention on the Law of Treaties, Articles 31 and 32.

2. Participants of the Interpretative Exercise

International Court of Justice (ICJ), in its advisory opinion in 1962 stated that the institutions of international organizations, *in the first place at least,* interpret their constitutions in order to carry out their functions.[9]

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[4] J.E. Alvarez, "Constitutional Interpretation in International Organizations" in J-M. Coicaud and V. Heiskanen (eds), *The Legitimacy of International Organizations,* (Tokyo: United Nations University Press) (2001), p. 104.

[5] *Alvarez*, p 104.

[6] A.D. Mcnair, "The Functions and Differing Legal Character of Treaties", (1930) XI *British Year Book of International Law,* p. 112.

[7] Petersmann, E, "How to reform the UN system? Constitutionalism, International Law, and International Organizations." (1997) 10 *Leiden Journal of International Law* , p. 426-437.

[8] Georg Ress, "The Interpretation of the Charter" in B. Simma (eds.), *"The Charter of the United Nations, Vol I"* (New York: Oxford University Press, 2002), p. 15.

[9] "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. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the interna-

The charters of most of the international organizations assign interpretation to particular organs, for example, plenary bodies in the Food and Agriculture Organization (Article 17 of the Constitution of the FAO), International Maritime Organization (Article 69 of the Convention on the IMO), Organization for African Unity (Article 27 of OAU Charter), The International Monetary Fund (Article 29 of the Articles of Agreement of IMF), and International Civil Aviation Organization (Article 84 of the Convention on the ICAO) are entrusted for the interpretation task.

The charters of several organizations such as ICAO (Article 84 of the Convention on the ICAO), FAO (Article 17 of the Constitution of the FAO) and World Health Organization (Article 75 of the Constitution of the WHO) envisage an appeal procedure and entrust authoritative interpretation to ICJ or a different arbitral body[10]. In the case of International Seabed Authority, the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea is assigned to interpret the questions arising within the scope of the activities of the Assembly or the Council of the Organization (Article 191 of the 1982 United Nations Convention on the Law of the Sea).

Most charters, including the UN Charter, do not officially entrust a particular body for interpretation.[11] According to the UN Charter, the interpretations of ICJ are not binding on the questions raised by the Security Council or General Assembly. During the negotiations on the drafting process of UN Charter in San Francisco there were different suggestions on the issue of who would interpret the Charter. Finally it was decided that each institutional organ has the authority to interpret.[12] Today this decision determines the authority of interpretation in many international organizations. Each institutional organ of an international organization can contribute to interpretative exercise. A legal interpretation, as made by any of the institutional organs of an international organization, once finds a general acceptance, is usually presumed to be authoritative when a similar issue arises in the future.[13] The institutional practice

tional court of justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction." *Certain Expenses of the United Nations*, *Advisory Opinion,* ICJ Rep. 1962, p. 168.

[10] C.F. Amerasinghe, "Interpretation of Texts in Open International Organizations" (1994) 65 *British Yearbook of International Law*, p. 180.

[11] *Alvarez*, p. 111.

[12] *ibid,* p. 112.

[13] *İbid.*, p. 113.

accepted uniformly is also conclusive within formal adjudication.[14]

The decision taken in San Francisco has established an evolutionary development in the field of international institutional law. In their daily activities, the organs of international organizations have created foundational interpretations of their constitutional treaties. Charters of the international organizations unlike the bilateral inter-state treaties have authorized different interpreters distinct from the treaty parties, and forced the members to accept these interpretations. Thus these treaties have become, "living constitutions" distinct from more static bilateral contacts.[15]

3. Different Canons of Interpretation:

The charters of the international organizations might be interpreted on the basis of power oriented approaches however this method grounds on the relative powers of the parties demanding an authoritative interpretation. This kind of power oriented but non-legal conclusions mostly create ongoing conflicts.[16] That's why charter interpreters rely on the rule of law while resolving interpretative disputes.

Articles 31 and 32 of the Vienna Convention on the Law of Treaties have been the most applied rules in interpretative exercise.

According to the article 31 of the Convention, a treaty must be interpreted basically in good faith in accordance with the ordinary meaning of the terms within their context and objects and purposes. In the following paragraphs the elements are listed which must be taken into account within the context or comprised in the context; such as the preamble and annexes, related agreements and instruments of the treaty, subsequent agreement between the par-

[14] *Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding the Security Council Resolution 276, Advisory Opinion* , ICJ Rep. 1971, paragraph 22; turning to past Council voting practices in order to help to determine the meaning of Article 27(3) of the Charter by stating 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... This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that organization."

[15] *Alvarez*, p. 113.

[16] *ibid.,* p. 114.

ties, subsequent practices, rules of international law and the special meanings attributed to the treaty by the parties' intention.

The preparatory work and the circumstances of the conclusion of the treaty are mentioned under article 32 as supplementary means of interpretation. This article is applied to the treaty when article 31 leaves the meaning ambiguous or obscure or causes an absurd or unreasonable result.

3.1. The Natural and Ordinary Meaning

Ascertainment of the natural and ordinary meaning in context has been accepted by the ICJ as a crucial rule of interpretation.[17] In the *Second Admissions Case* ICJ stated that the words had to be interpreted according to their ordinary meaning in the context, unless such interpretation would cause an unreasonable or absurd result.[18] Therefore it is not a narrow interpretation of words, articles or phrases but each of them related to the constitution as a whole.[19]

The Court repeated its view in the *IMCO Case* by interpreting the 'largest ship owning nations' term in the Article 28 (a) of the IMCO constitution in its natural and ordinary meaning. The Assembly of IMCO (Inter-Governmental Maritime Consultative Organization) did not elect Liberia and Panama to the Maritime Safety Committee notwithstanding the Article 28(a) of the IMCO Constitution. Article 28 (a) stipulates that the Maritime Safety Committee must consist of fourteen states and at least eight of them must be the largest ship owning nations. Liberia and Panama were the countries which were amongst the eight largest ship owning nations in the Lloyd's List at the time. The Court stated in its advisory opinion that in electing neither Liberia nor Panama to the Maritime Safety Committee, the Assembly of the Inter-Governmental Maritime Consultative Organization had failed to comply with the Article 28 (a) because the largest ship owning nations term in this article solely referred to registered tonnage.[20]

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[17] See ,for example, Admission of a State to the United Nations, Advisory Opinion, ICJ Rep. 1948, p. 57.; Certain Expenses of the United Nations, Advisory Opinion, ICJ Rep. 1962, p. 151; Competence of Assembly Regarding Admission to the United Nations, Advisory Opinion, ICJ Rep. 1950, p. 8.

[18] Competence of the General Assembly for the Admission of a State to the United Nations, ICJ Reports 1950, p. 8.

[19] C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations,* (Cambridge: Cambridge University Press) (1996), p. 43.

[20] Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Con-

3.2. The Object and Purpose- Teleology

Under Article 31 Paragraph 1 of the Vienna Convention on the Law of Treaties, the treaties shall be interpreted in accordance with their objects and purposes. There are many cases where the natural and ordinary meaning has been changed in the light of aims and objects.

In some cases interpreters directly go to the objects and purposes as has done in the *IBRD Case* (International Bank for Reconstruction and Development Case). In 1986 the executive directors of the IBRD had to solve a problem about the Article II of the Articles of Agreement of the IBRD. The authorized capital of IBRD was defined as "in terms of United States dollars of the weight and fineness in effect on July 1, 1944" by the Article II Section 2(a) of the IBRD agreement. The problem occurred after the introduction of the Special Drawing Right (SDR) by International Monetary Fund (IMF), which was to replace the gold standard. Because of the introduction of the SDR the Executive Directors interpreted the Article II according to the changing conditions.[21] The interpreters stated that "*by reading the words 'United States dollars of weight and fineness in effect on July 1, 1944' in Article II section 2(a), of the Articles of Agreement of the Bank to mean the Special Drawing Right introduced by the Fund, as the SDR was valued in terms of United States dollars immediately before the introduction of the basket method of valuing the SDR on July 1, 1974, such value being 1.20635 United States dollars for one SDR.*"[22]

This interpretation indicates that the natural and ordinary meanings of the words in Article II have been changed completely and the objects and the purposes are considered in the first place in order to keep up with the developments.

The constitutional implied powers have also a significant role in the teleological interpretation process. According to this doctrine the constitutions

sultative Organization, ICJ Rep. 1960, p.170.

[21] Amerasinghe, *Principles of the Institutional Law...*,p. 33.

[22] World Bank, Decisions of the Executive Directors under Article IX of the Articles of Agreement on Questions of Interpretation of the Articles of Agreement (1991) p. 22, (Decisions No.13 of 14 October 1986), quoted Amerasinghe, p.34.

have inherent features to enable the organizations to perform their functions properly even if the charters are silent in some issues. Therefore the treaties should be observed as a whole with all other relevant materials.[23] *Reparation Case*, *Personal Work of Employers Case and* the *Effects of Awards Case* are good examples showing how the doctrine of implied powers was implemented as a method of interpretation

In the *Reparation Case* the question was whether the UN, as an organization, had the capacity to bring an international claim on behalf of its staff.[24] ICJ stated its view as follows:

"*Under International Law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implications being essential to the performance of its duties."*[25] The Court consequently stated that *"Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the charter."*[26]

Another example where the term of implied powers was mentioned is the *Personal Work of Employers Case*[27]. This time the issue was if the ILO (International Labour Organization) had an implied power to regulate the work of employer. The PCIJ (Permanent Court of International Justice) stated that the drafters of the Constitution of the ILO "*clearly intended to give the ILO a very broad power of co-operating with them in respect of measures to be taken in order to assure humane conditions of labour and the protection of workers. It is not conceivable that they intended to prevent the Organization from drawing up and proposing measures essential to the accomplishment of that end. The Organization, however, would be so prevented if it were incompetent to propose for the protection of wage –earners a regulative measure to the efficacious working of which it was found to be essential to include to some extent*

[23] A. Aust, *Modern Treaty Law and Practice, (*Cambridge: Cambridge University Press) (2000), p. 202.

[24] Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Rep. 1949, p. 174.

[25] *ibid.,* p. 182.

[26] *ibid*., at 184.

[27] Competence of the International Labour Organization to Regulate Incidentally the Personal Work of the Employer, PCIJ Series B No. 13, 1926, p. 6.

work done by employers."[28]

In 1954, in the *Effects of Awards Case,* the ICJ had to decide, *inter alia*, if the UN had an implied power to establish an administrative tribunal to settle disputes between the Organization and its staff.[29] The Court stated that in order to provide efficiency in the working of the secretariat, the power to institute a tribunal, to do justice between the Organization and the staff members, was essential, and this power arose out of the charter.[30]

The existence of implied powers elevates the importance of the provisions in an international organization's charter which have restrictive meaning on the authority of the organization or its organs. If an organization attempts to an action not inconsistent with its charter the expressed constitutional limitations become a significant protection on the violation of members' "residual rights." One of the most common examples of these rights is the Article 2(7) of the UN Charter which prohibits the interference to members' domestic jurisdictions.[31] Institutional powers on the grounds of customary or implied powers also increase the importance of making timely objections to the actions of the members or the organs before they are accepted as institutional practice.[32]

3.3. Subsequent Practice

Article 31 Paragraph 3 of the Vienna Convention on the Law of Treaties emphasizes the important role of subsequent practice. According to Paragraph 3 subsequent practice shall be taken into account, together with the context. When a text is ambiguous or silent in some issues subsequent practice helps the interpreters in filling the gaps or determining the meanings of the words.

There are some arguments about the legitimacy of subsequent practice as a method of interpretation. First of all the institutional practice does not always reflect the consent of the members of the international organizations. Another problem is that, if the subsequent practice is accepted as the contemporary

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[28] *ibid.* p. 18.

[29] Effects of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, ICJ Rep. 1954, p. 47.

[30] *ibid.*, p. 57.

[31] Alvarez, p. 122.

[32] *ibid., p*. 123.

intent of the members, then it is hard to explain why this practice seems more important than the original intent of the parties which is indicated as a canon of interpretation in the Vienna Convention on Law of Treaties[33]. According to Amerasinghe, as a response to these arguments, subsequent practice as a means of interpretation of constitutions has an independent juridical basis. Practice becomes a method of interpretation purely because it is the practice of the organization.[34]

It is considered that there are some limits on the implementation of subsequent institutional practice. First of all practice must conform to purposes of the charters. Secondly subsequent practice must only be applied to fill the lacunae, not for formal amendments changing the rights and obligations of the members as indicated in the charter.[35]

The belief that unchallenged institutional practice reflects the consent of the member states is not very persuasive. Many authorizations of the Security Council, for example, even protested by member states, accepted as institutional practice.[36] Although it is doubtful if the decisions of Security Council reflect the contemporary intents of the state parties due to its anti-democratic structure, the opposition of the members do not prevent the implementations of these decisions.[37] Thus, these implementations become subsequent practice with or without the consent of the members.

Although there are some problems with respect of the implementation of subsequent practice it has been used primarily in many cases as a method of interpretation.

In the *Second Admissions Case* the Court interpreted Article 4 of the UN in its natural meaning but also supported this view with the practices of General Assembly and Security Council in which the acceptance of a state to the UN was decided by General Assembly on the basis of a recommendation of

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[33] *ibid.*, p. 118.

[34] Amerasinghe, *Principles of the Institutional....*, p. 52.

[35] Alvarez, p. 119.

[36] Many scholars considers that Council authorizations of force with respect to Kurds in Iraq (1991), Somalia (1992-93), Haiti (1994), Rwanda (1994), or in Bosnia- Herzegovina (1995), as important legal precedents of permissible "humanitarian intervention" under both the Charter and general international law. For a detailed explanation see F. R. Teson, "Collective Humanitarian Intervention", (1996) 17 *Michigan Journal of International Law*, p. 343 -369, 371.

[37] Alvarez, p. 120.

the Security Council.[38]

In 1995 the members of the European Union decided to replace the ECU with EURO without amending the Treaty. This is a good example of application of the subsequent agreement stipulated in the Article 31 paragraph 3 of the Vienna Convention.[39]

Namibia Case is a very striking example of interpretation regarding subsequent practice. In this case ICJ directly applied the subsequent practices of Security Council as a method of interpretation. The Court pointed out that the voluntary abstention of a permanent member did not prevent the adoption of resolutions due to the consistent practice of the Security Council members.[40] Judge Dillard, in his separate opinion, argued that institutional practice could not be sufficient to modify what was unambiguously stated in UN Charter.[41] However in the *Second Admissions Case* Judge Azvedo, in his dissenting opinion, stated that methods of interpretation had to have an evolutionary feature in order to keep up with the new requirements.[42] As understood each method of interpretation attains its validity and importance according to the different views of the different interpreters. The importance attributed to subsequent practice depends on interpreter's individual approach regarding the propriety of dynamic interpretation.[43]

In many cases, the references for subsequent practice have repetitive characteristics.[44] However in *European Commission on the Danube Case*[45] or in the *IMCO Case*[46] the practice occurred only once, in these cases subsequent

[38] Competence of Assembly Regarding Admission to the United Nations Advisory Opinion, ICJ Rep. 1950, p. 9.

[39] Aust, p. 192.

[40] Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding the Security Council Resolution 276, ICJ Rep. 1971, Advisory Opinion, p. 22. South Africa contended that the Security Council Resolution 284 was invalid under Article 27(3) of the UN Charter since two permanent members were absent during the voting process of resolution.

[41] *ibid.* P. 153-154.

[42] *Competence of the General Assembly for the Admission of a state to the United Nations,* ICJ Rep.1950*,* p. 30-33.

[43] Alvarez, p.119.

[44] Amerasinghe, *Principles of the Institutional...*, p. 50.

[45] Jurisdiction of the European Commission of the Danube between Galatz and Brailai PCIJ Series B. No. 14, 1927, p. 57-8.

[46] Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, ICJ Rep. 1960, p. 167-8.

practice was just used as an evidence to determine the natural and ordinary meaning.

3.4. Intent- Preparatory Work (*Travaux Préparatoires*)

Article 32 of the Vienna Convention on the Law of Treaties stipulates the preparatory work as a supplementary method of interpretation. If resort to the methods of interpretation regulated in Article 31 leaves the meaning ambiguous or leads to an absurd or unreasonable result interpreters may recourse to the preparatory work of the treaty. Intention can be categorized as the original intent and the contemporary intent. Contemporary intent is much more related to the subsequent practice which has been discussed above.

The recourse to original intent especially in the constitutional interpretation is considered to be pointless because the analysis of the preparatory work is time consuming and not very functional in the decision process.[47] In the *First Admissions case*[48] and the *Second Admissions Case*[49] the Court stated that the texts were clear enough and did not find it necessary resorting to the preparatory work.

There are not many examples where the preparatory work has been resorted during the interpretative exercise as a primary source. In the *IMCO Case*, for example, the preparatory work was resorted to in order to support the views which were primarily interpreted by other methods.[50]

The recourse to preparatory work as a method of interpretation is a very exacting task. It is very difficult to determine the original intents of the parties. Also the preparatory works are far from reflecting the intents of the new members. Although these concerns create problems on the legitimacy of the preparatory works it is still a method of interpretation and not totally ignored by the charter interpreters.

Conclusion

[47] Aust, p. 199.

[48] Admissions of a State to the United Nations (Charter, Art. 4), ICJ Rep. 1948, p. 63.

[49] Competence of Assembly Regarding Admission to the United Nations, ICJ Rep. 1950, p. 8.

[50] Amerasinghe, *Principles of the Institutional...,* p. 56.

The means of interpretative exercise depends on the context of the specific case and the structure of the constitution. In this paper the different canons of interpretation are examined by giving different examples from the constitutions of the particular organizations.

It is undeniable that the interpreters, during the interpretation process, give a primary role to objects and purposes rather than the ordinary meaning and the original intent. The very persuasive explanation why interpreters tend to resort to the teleological interpretation was made by Judge Alvarez in the *Second Admissions Case.* Alvarez stated that:

"...when interpreting treaties- in particular the Charter of the United Nations- to look ahead, that is to have regard to the new conditions, and not to look back, or have recourse to travaux préparatoires. A treaty of a text that has once being established acquires a life of its own. Consequently in interpreting it we must have regarded to the exigencies of contemporary life rather than to the intentions those who framed it."[51]

The approaches of the interpreters and the concrete implementations of the interpretation indicate that it is nearly an obligation to interpret the charters on the grounds of objects and purposes of them. Natural and ordinary meaning should be treated in the light of objects and purposes. It is clearly understood from the views of interpreters that subsequent practice and contemporary intend are considered to be attached to the aims of the constitution of an international organization. When the intense day to day practices and complex structure of international organizations is considered it is nearly an obligation to interpret them in an evolutionary way.

[51] Competence of the General Assembly for the Admission of a State to the United Nations, ICJ Rep.1950, p. 18.

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