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Considerations on Limits to Dynamic / Evolutive Interpretation of Constituent Instruments of International Organizations (with the Particular Reference to the UN System)

Abstract: International organizations, for the purpose of further considerations are these established by multilateral treaties constituting their internal legal order and establishing legal personality for them, which is independent and separate from their member states. The emphasis in this article is on the UN and its Specialized Agencies. Since in practice their constituent instruments are interpreted on the daily basis in the continuous process of performing their functions and filling the gaps, some of extensive interpretations may lead to informal modifications of the constitutional instruments. To examine whether there are any limits to the dynamic / evolutive (extensive) interpretations is of grave significance both for international law doctrine and practice, as well as political reality. In conclusion: the Report and the IDI Resolution adopted on 4th September, 2021, are the good ground for better understanding of recent developments in the daily lives of the UN System.

Key words: dynamic interpretation, evolutive interpretation, international organizations, international law, UN System

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Preliminary issues

The Charter of the United Nations, as well as other statutes of international organizations, are today an important source of norms regulating the behaviour of states and have become an integral part of international law. The provisions contained in the statutes formulate, inter alia, the scope of competences of the organizations and its bodies, and as a result they also apply to its members, i.e. sovereign states. Defining the competences of the organs of international organizations has, therefore, the aim and, at the same time, an enormous theoretical and practical significance. These competences are usually regulated in one, but sometimes also in several international agreements, or they are a part of an extensive legal act. In the process of applying statutory norms, the organs of an international organization interpret the statutory provisions in a specific way. It is worth noting that in most statutes of international organizations, if the matter of interpretation is regulated at all, it is about "interpretation and application." Therefore, a question can be formulated: does each application of the law require its interpretation? The practice of some countries and the opinions of many authors definitely contradict this thesis. Among the classics of the law of nations, for example, de Vattel believed that interpretation is not an inherent element of the application of a legal norm, applying the principle that what does not require interpretation should not be interpreted (de Vattel, 1758, vol. II § 263, vol. II, ch. XVI; Bernhardt, 1995, pp. 1416–1426; Kuźniak et al., 2017, pp. 35–37). On the other hand, Phillimore wrote that in all statutes and in all conventions the way in which a norm is expressed should be general, so that its application would be detailed (Phillimore cited by Ehrlich, 1957, p. 71). This view was developed by Ehrlich, as a Polish national judge, in a separate opinion attached to the judgment passed by the Permanent Court of International Justice in the case of the Chorzów factory. Basing on the formulation of Ehrlich, Hudson states that interpretation as a process of determining the meaning of a text should be distinguished from the application, i.e. the process of determining the consequences of texts in a given situation (Hudson, 1934, p. 615; see also Ehrlich 1928). It was and still is an important research issue.

1. Statutes of international organizations and their special features

In international practice, a wide range of legal solutions has developed, allowing the establishment of an international organization. For example, the OSCE was established not as a result of a treaty, but on the basis of a resolution adopted by states participating in the CSCE process[2].

2 Within the meaning of Chapter VIII of the UN Charter, the OSCE is a regional organization. It was established by the decision of the heads of states and governments during the 1994 Budapest

The statutes of international organizations, compared to other traditional multilateral agreements, show many specific features. Matters such as the conditions of entry into force, reservations, revision procedures, and sometimes the rules of interpretation are regulated differently, both by positive law and by practice. Contrary to ordinary multilateral treaties, the statutes not only regulate the mutual obligations and rights of the signatory states, but also create a new joint institution to pursue specific goals set out in the statutes. It is significant that these institutions created at the will of states have their own organs, sometimes they create them themselves and through them actively participate in international relations. Some international organizations meet the criteria of a subject of international law. They are of a public-law nature, conclude international agreements *(ius tractatuum)* with states or other international organizations, enjoy a passive and active right of legation *(ius legationis),* and sometimes participate as a party before an international tribunal *(ius standi).* Therefore, they are equipped with competences that prove their legal and international subjectivity. Shermers says they are equipped with a "living constitution" *(living instrument)*, the interpretation of which changes as the organization's environment evolves (Shermers, 1972, p. 168). Consequently, he states that, although the organization is based on a multilateral agreement, after the establishment of organs and while performing their functions, the contractual element of the agreement is slowly disappearing, while the institutional ("constitutional") element is gaining in importance. This leads to a distinction between this type of international agreements, such as the statutes of international organizations, which can be described as a kind of "*traités lois"*, and other contracts in reference to which a contractual element can be emphasized (the so-called, *traités-contracts*)[3]. Such a distinction leads in consequence to the creation of a temptation to adopt different rules for the interpretation.

Therefore, important questions arise that affect the opinions expressed in the doctrine as well as in jurisprudence and are reflected in the practice of applying legal norms. They relate to such basic issues as the adequacy of the principles and rules of interpretation, formulated in the Vienna Convention on the Law of Treaties (especially the 1969 Convention[4]) for the interpretation of constitutional acts of international organizations through the practice of the organs of these organizations, and in particular the limits of such interpretation, which may lead to modifications or

summit. Recognizing the change in the nature of the CSCE's activities, it was transformed into an international organization.

3 A pioneer of this view is A. Alvarez, who spoke on this subject, inter alia, in separate opinions on the matter of admitting new members to the United Nations – *Recueil* CIJ, 1950, p. 16 ed seq., and the matter of reservations to the Genocide Convention – *Recueil* CIJ, 1951, p. 53.

4 The Vienna Convention on the Law of Treaties, drawn up in Vienna on 23 May 1969, Journal of Laws No. 90.74.439.

amendments to the provisions of the statute[5]. Thus, the dilemmas concern the legal consequences of the so-called "dynamic" or "evolutive" and, as a result, "extensive" (expanding) practices of international organizations and member states in the process of applying statutory norms. The members of the International Law Commission in the work on the text of the "treaty on treaties", also referred to as "the code of the law of treaties," paid a particular attention to these issues (e.g. Nahlik, 1976). The work on the Vienna Convention took a long time, and the representatives of the UN member states, as well as those who can be classified as the so-called United Nations families, i.e. UN specialized organizations, participated in it.

2. Work of the Institute of International Law (IDI)

The members of the Institute of International Law have also dealt with issues related to the interpretation of treaties several times (Fr. *Institute de Droit International* – IDI). It took place during the preparation of successive resolutions of the institute, treated as important positions in the doctrine of public international law. It is worth mentioning here that the Institute, which was established in 1873, is considered the most prestigious scientific association, grouping top-class specialists in both public and private international law. The number of the members of the Institute is limited, and the admission procedure to the group of the members of the Institute requires meeting very high criteria, especially in terms of scientific competence, as well as their relationship with practice. This international group of lawyers also includes several Polish members[6].

The Institute operates on a permanent basis, which is manifested in the fact that certain issues are discussed in committees which take place in the intersession period. In contrast, during the Institute's biennial sessions, the results of the committee's work are presented and discussed, both in the thematic committees and in plenary sessions.

Resolutions and declarations are passed in plenary sessions. Naturally, they do not have a binding meaning, but they are evidence of the opinion of the outstanding lawyers and may be treated as the subsidiary means for the determination of rules of law within the meaning of Art. 38 sec. 1 letter d of the Statute of the International Court of Justice. Therefore, it is difficult not to take into account balanced positions

5 It is worth emphasizing that the procedures contained in the statutes of many international organizations relating to changes or revisions are usually so formalized that in practice they remain a "dead letter".

6 In order of selection: G. Roszkowski (1882), F. Kasparek (1883), M. Rostworowski (1898), B. Winiarski (1929), L. Babiński (1947), M. Lachs (1963), S. Hubert (1965), K. Skubiszewski (1971), K. Marek (1979), J. Makarczyk (1993), K. Lankosz (2005). Cf. K. Lankosz (2014), pp. 127–128.

and opinions, especially expressed in the form of acts passed during the Institute's sessions.

The aforementioned legal acts, especially the resolutions, are the result of works carried out in thematic committees, and the issues under consideration are based on extensive reports prepared by the so-called Rapporteurs. In the process of formulating the text of the Vienna Convention on the Law of Treaties (1969), as well as the Convention on the Law of Treaties, concluded by international organizations (1986)[7], not only the opinions and positions expressed by the members of the International Law Commission, state delegates, but also by the members of the Institute of International Law were taken into account.

Since the important issues concerning the influence of the interpretative practice on the modification or amendment of the statute of an international organization appeared shortly after the adoption of the United Nations Charter, this issue was the basis for deliberation even before the establishment of the International Law Commission and is an issue that was also reflected in debates at subsequent meetings of the Institute[8], which ended with the resolution on 4 September 2021. The basis for taking up the topic of the issues of interpretation of constitutional acts of an international organization through practice was and is the noticeable development of international organizations (the so-called intergovernmental), their diversification and more and more numerous examples of recourse to such actions (practices) by the organs of the organization that were aimed at applying the dynamic/evolutive interpretation, and consequently sometimes leading to an informal change of the statute.

3. Report presented to the members of the Institute (IDI)

Due to the number and diversity of international organizations, it was decided to limit the work of the Institute to only those that can be defined as belonging to "the United Nations family," i.e. the United Nations itself and its specialized organizations.

The Institute entrusted Ms. Mahsanoush Arsanjani, an outstanding lawyer educated at the most renowned American university, with the preparation of a report on this matter as a basis for further work and deliberation. The Report presented at the Institute's session in the Hague in 2019 has 151 pages and was published in the Institute's yearbook ("IDI Annuaire"). In the Report you can get acquainted with a detailed and interesting, and above all, very thorough and competent presentation

7 The convention has not entered into force.

8 Cf. The report presented at the Institute's session in the Hague, „IDI Annuaire" 2021, pp. 101–107. The report is available on the website: „IDI Annuaire", https://www.idi-iil.org/en/publications-par-categorie/rapports/ (22.11.2021); later referred to "the Report."

of the issues concerning the interpretation of the Charter of the United Nations by its organs, which issues had already been discussed in the Committee IV / 2 of the San Francisco conference. The Report includes, inter alia, the position of Belgium (the Report, 2021, pp. 103–105), as well as subsequent opinions expressed by the representatives of the member states and judges of the International Court of Justice.

Yet, the most extensive part of the Report is the analysis of the interpretation practice of the statutes of the organization of the UN system. In the first place, the practice of the UN General Assembly, concerning the interpretation through practice of Art. 5 of the Charter (the Report, 2021, pp. 121–132), extending the competences of the General Assembly related to its competence, regarding the maintenance of international peace and security (*Uniting for Peace* resolution) and the interpretation of Art. 1, 55, 73 and 76 of the Charter in the context of the principle of self-determination of nations (the Report, 2021, pp. 132–169).

The interpretative practice applied by the Security Council, which had an impact on a certain "understanding" of the provisions of the Charter, also concerned Art. 24 (the case of the Free City of Trieste); Art. 27, concerning voting in the Security Council, and in particular Art. 27 par. 3 concerning abstentions, the absence of a representative of the Permanent Member of the Security Council during the vote; issues related to the legislative powers of the Security Council; once again the importance of Security Council decisions in the context of Art. 41, i.e. the UN Compensation Commission, the creation of international tribunals, as well as the introduction of temporary territorial administration as a consequence of the generally formulated principle of "maintaining international peace and security."

4. More important examples of the interpretative practice of international organizations

Furthermore, other interpretative practices of the provisions of the UN Charter were analysed in the Report. These concerned the powers of the General Assembly related to the possibility of issuing recommendations on matters falling essentially within the powers of the Security Council (Article 12 of the Charter), the right to self-defence in United Nations peacekeeping operations (Article 51 of the Charter); the possibility of withdrawal from the United Nations (the case concerning the withdrawal of Indonesia in 1965) and the powers of the Secretary General to perform good offices (the Report, 2021, pp. 169–171). Numerous examples of interpretations of statutes of specialized organizations discussed in the Report concern the interpretative practice of WHO, WTO, IMO, ILO, the World Intellectual Property Organization (the Report, 2021, pp. 182–194), as well as the interpretation of the term "state" in the context of membership in an international organization (the Report, 2021, pp. 189–193). Arsanjani devotes a separate attention to the practice of

the World Bank and the International Monetary Fund. It is worth emphasizing here that in this respect she is a particularly competent person due to many years of work in high positions in both of these organizations.

The jurisprudence of international tribunals, especially the ICJ, provides numerous examples of drawing attention to the practice of the organs of an international organization as a means of adapting to the requirements of a changing environment (a temporal element) (the Report, 2021, pp. 202–225).

While reading successive examples of successively presented motions for resolutions of the Institute, it is impossible not to pay attention to the change of the title of the final resolution. The amendment that reflects the attitude of the members of both the working committees and the outcome of the plenary debate. The work on the resolution began and continued until the final session in 2021 in the field of: "Are there any limits on the interpretation of the statutes of international organizations, and especially the organizations of the UN system?"[9] The text of the resolution adopted on 4 September 2021 leaves no doubt that such limits exist[10]. This is expressed in the change of the title, which not so much poses the question of the existence of limits to such an interpretation, but clearly suggests and even confirms that such limitations exist.

The second significant change that is easily recognizable in the title is the removal of the term "dynamic interpretation" and the replacement with another term, namely "evolutive interpretation." This change requires a comment. The Report presents in detail various examples of the interpretation practice of the statutes (including the UN Charter), which have been the subject of many publications and disputes in the doctrine as to their legality. This concerned the taking over of some of the tasks of the Security Council, and thus extending the powers of the General Assembly, which, as a rule, the Charter endows the Security Council. This concerns the issue of the *Uniting for Peace* resolution, as well as issues related to the establishment of international criminal tribunals by the Security Council, often referred to as *ad hoc* tribunals for crimes committed in the territory of former Yugoslavia and crimes committed in Rwanda. The legality and compliance with the provisions of the Charter in the abovementioned cases was the subject of criticism as to the legality of the extension of powers – in the first case of the General Assembly, and in the

9 Eng. *Are there Limits to the Dynamic Interpretation of the Constitution and Statutes of International Organizations by the Internal Organs of such Organizations (with Particular Reference to the UN System)?*. Fr. *Y a-t-il des limites à l'interprétation dynamique de la Constitution ou du statut des organisations internationales par les organes de celles-ci, avec une référence particulière au système des Nations Unies?*

10 Eng. *Limits to the Dynamic Interpretation of their Constituent Instruments by the Organs of the United Nations and International Organizations within the United Nations System*. Fr. *Limites à l'interprétation évolutive des actes constitutifs des organisations du système des Nations Unies par leurs organes internes*.

second case (concerning international criminal tribunals) – of the Security Council. Importantly, nevertheless, the examples cited were exceptional and were taken in a special situation and until today they have not been followed in practice. It can be assumed that these interpretations were, in a sense, exceptional.

The situation is different, however, when, in practice, the General Assembly or the Security Council applied the expanding and dynamic interpretation, referring to the previously adopted legal acts, i.e. decisions and resolutions which took the form of a treaty, and therefore, no longer norms of a *soft law* character, but *hard law*. This was the case with the interpretation of the United Nations Charter concerning the broadly understood protection of human rights, including in particular the Universal Declaration of Human Rights, issues related to racial discrimination, the right to self-determination, and the powers of the UN Secretary General in the field of peace missions aimed at maintaining international peace and security (the Report, 2021, pp. 162–167). Similar examples of practice had already taken place before, and they concerned important issues concerning the voting procedure in the Security Council in the absence of a representative of a state-permanent member of the Security Council, as well as the interpretation of Art. 27 sec. 3 regarding the interpretation of the agreement of votes of all permanent members. The textual interpretation unequivocally indicates that the unanimity of the votes should be considered as those which were adopted in favour of the resolution, while the practice developed that abstaining from voting does not reflect the lack of such unanimity.

Thus, the examples of interpretations presented in the Report are those which were of a specific, one-off nature, although influencing later practice, constituting an actual informal amendment to the provisions of the Charter, but also such examples of practice which developed the provisions of the Charter gradually.

Further reflections may also arise from replacing the term "dynamic interpretation" with the term "evolutive interpretation." The aforementioned term "dynamic" may suggest that such an interpretation is relatively far-reaching and produces significant effects over a foreseeable period of time. This temporal element is also present in the analysis of the term "evolutive", but it assumes a gradual, slow build-up of a certain trend, the way of understanding the statutory provisions. As a result, it may lead to modification or change. As a consequence, some of the interpretation methods can be described as dynamic, while others are evolutive. Finally, there are also examples of interpretations which relate to specific situations, problems related to the necessity to enable fulfillment, achievement of goals and tasks, and are undertaken *ad casum*. In accordance with the general principles of interpretation set out in the Vienna Convention (1969), which reflect customary international law, each of these interpretations is valid in situations where the text is unclear. The interpretation must be made in good faith and in accordance with international law, and in particular, it must not be inconsistent with peremptory norms *(ius cogens).* The practice-based interpretation in each of its manifestations,

be it "dynamic," "evolutive" or *ad casum* (Lankosz, 1985, pp. 215–216; see also Kocot, 1971, p. 275), remains a binding *intra vires*[11].

5. IDI Resolution

The resolution of the Institute of International Law of 4 September 4 2021[12] is the result of over two years of work on the basis of the presented report by Mahsanoush Arsanjani and subsequent draft resolutions prepared by her and with her participation. The indicated elements of the stages of creating the final document may be assessed by some as an expression of a certain restraint, and perhaps even conservatism, often attributed to the positions of some members of the Institute, as well as adopted resolutions. The change of the title of the final version of the resolution proves the confirmation of the role of the practice of an international organization, which influences the understanding of the essential provisions of the statute in many cases, which may in fact lead to its modification and informal change.

The emphasis on the evolutive and not dynamic nature of interpretation, and therefore a certain reluctance to accept more radical interpretation processes, characterized by a specific dynamism, is not a manifestation of a conservative attitude, but a balanced position in the doctrine of public international law.

The author participated in the work of the Institute on subsequent draft resolutions and the final text. Due to the indicated characteristics of the interpretation through the practice of internal organs, in the author's opinion, they can be defined with different terms. In some situations it is legitimate to use the term "dynamic", in others "evolutive" is a more appropriate term, and some are interpretations made *ad casum*.

Conclusions

The previously presented examples of interpretations are justified only when the interpretation is made in good faith, when the provisions of the statute are unclear, there is a need to fill the gaps in the statutory provisions allowing for adaptation to the requirements of the changing reality. It is therefore absolutely legitimate to define the statutes of international organizations as *"living instruments"*. In any event, the interpretation cannot be made in breach of peremptory norms *(ius cogens*),

11 Point 7 of the Institute's Resolution of 4 September 2021: *Unless otherwise provided in the constituent instrument of the international organization, when there is a general agreement among the membership of the international organization as to an interpretation, the interpretation should be presumed to be valid and intra vires*.

12 https://www.idi-iil.org/app/uploads/2021/09/2021_online_07_en.pdf (25.11.2021).

it must be in accordance with international law, be the result of the "*general*" will and acceptance of the member states, and then it may be binding *intra vires*.

REFERENCES

Bernhardt, R. (1995). Interpretation in International Law. In: R. Bernhardt (Ed.), *Encyclopedia of Public International Law, vol. II*. Amsterdam-Lausanne-New York-Oxford-Shannon-Tokyo: Elsevier.

Ehrlich, L. (1957). *Interpretacja traktatów*. Warszawa: Wydawnictwo Prawnicze.

Ehrlich, L. (1928). L'interprétation des traités. *RCADI*, *24*(4), 12–32.

Hudson, M.O. (Ed.) (1934). *World Court Reports, vol I (1922–1926)*. Washington: Carnegie Endowment for International Peace.

Lankosz, K. (1985). *Interpretacja statutów organizacji międzynarodowych*. Kraków: Zeszyty Naukowe Akademii Ekonomicznej w Krakowie – Seria Specjalna „Monografie".

Lankosz, K. (Ed.) (2014). *Wielka encyklopedia prawa, Tom IV – Prawo międzynarodowe publiczne*. Warszawa: Fundacja Ubi Societas, Ibi Ius.

Kocot, K. (1971). *Organizacje międzynarodowe. Systematyczny zarys zagadnień prawa międzynarodowego*. Wrocław-Warszawa-Kraków-Gdańsk: Ossolineum.

Kuźniak, B., Marcinko, M. & Ingelevič-Citak, M. (2017). *Organizacje międzynarodowe*. Warszawa: Wydawnictwo C. H. Beck.

Nahlik, S.E. (1976). *Kodeks prawa traktatów*. Warszawa: Wydawnictwo PWN.

Shermers, H.G. (1972). *International Institutional Law*, *vol. II*. Leiden: Brill.

de Vattel, E. (1758). *Le droit des gen sou principes de la lci naturelle, vol 2*, Londres.

Opinions and other documents:

Alvarez A., *Recueil* CIJ, 1950 concerning the admission of new members to the United Nations.

Alvarez A., *Recueil* CIJ, 1951 concerning reservations to the Convention on genocide.

The report of the Institute of International Law: *Are there Limits to the Dynamic Interpretation of the Constitution and Statutes of International Organizations by the Internal Organs of such Organizations (with Particular Reference to the UN System)? / Y a-t-il des limites à l'interprétation dynamique de la Constitution ou du statut des organisations internationales par les organes de celles-ci, avec une référence particulière au système des Nations Unies?*, „IDI Annuaire" 2021.

The resolution of the Institute of International Law of 4 September 2021: *Limits to Evolutive Interpretation of the Constituent Instruments of the Organizations within the United Nations System by their Internal Organs / Limites à l'interprétation évolutive des actes constitutifs des organisations du système des Nations Unies par leurs organes internes.*