

XI

The Charter of the United Nations as a World Constitution

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Forty-seven years ago I had the privilege of attending the famous Thursday afternoon seminars on public international law conducted by Georg Schwarzenberger at the Institute of Advanced Legal Studies in London. Mr. L. C. Green, a young university lecturer full of erudition, was one of the animating personalities at those memorable meetings. We became and remained friends and I watched with admiration as he travelled the world garnering a multitude of richly deserved prizes, in England, Singapore, Israel, Canada, and the United States. Now, half a life time later, it is a pleasure to publicly express my respect and good wishes to him and his lovely wife, Lilian, in this splendid book of essays published under the distinguished auspices of the United States Naval War College.

THE PURPOSE OF THIS PAPER IS TO CONSIDER the Charter of the United Nations and its associated provisions, as represented by resolutions and declarations of the organization, from a constitutional point of view. More particularly, I want to reflect on whether the Charter has risen above the status of a mere international treaty to become something of a constitution for the international community as a whole. This question is increasingly important in view

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of the number of States members of the United Nations and the variety of situations that call for more detailed regulation in the management of international affairs. The main object of the essay is to emphasise the extent to which the complex legal structures of the Charter and the law generated by the organization are in fact providing constitutional guidance in the normative evaluation of conflicts over interests and values which global integration is bound to produce and must resolve.

The constitutionalist perspective is about the establishment of important, albeit limited, supranational competencies and the adjustment of national legal orders to guidance and direction from the organized international community. To consider the Charter of the United Nations as the constitution of the international community *tout court* marks a significant step towards centralization at the expense of classical sovereignty in international society. Constitutionalism is also about democratic governance and respect for individual rights. I hope to show that the constitutionalization of the principles of the Charter is fully in line with the inclusionary ideals embodied in democratic constitutions and can thus be understood as complementary features of national constitutional traditions.¹

What needs to be assessed is the status of the Charter in the system of international law, that is, whether it is a mere treaty, albeit with universal scope and near-universal membership, simply restating principles of customary international law, or whether this "*Charte Octroyée*" is recognized as a constitution increasingly influential in the active creation and consolidation of a universal legal community.² The object of my remarks is to encourage discussion of the latter perspective and, importantly, its implications.

In order to identify the major principles that ensure the existence of different States and the compatibility of the objectives of those States with the obligations they have assumed, I will start with a brief overview of the most relevant of the Charter's 111 articles.

The Charter of the United Nations

The Charter is today a combination of different sets of provisions. A number of them state general principles now largely accepted by States and by doctrine as principles valid *erga omnes*, some of which have a *jus cogens* nature. Other provisions have a more "technical" value, their task being to shape the constitutional framework of an international organization empowered with the potential to play a major, sometimes overriding, role in the international community.

Articles Stating Principles Erga Omnes and of Jus Cogens. As Zemanek puts it, almost all the fundamental principles of international law can be found in the Charter.³ The Charter has consolidated previously existing rules and developed new principles of international conduct, giving both categories “a distinct legal status [obtained] by having been formally incorporated into a multilateral treaty of historic importance.”⁴

The Preamble summarizes the objectives and the purposes of the United Nations. To some extent, it duplicates the provisions of Articles 1 and 2. However, the first lines of the Preamble seem to give the Charter a forward-looking constitutional flavor. The “Peoples of the United Nations” are said to enjoy rights and obligations under the document. In fact, the Preamble, which reflects the language of the Constitution of the United States, represents the first time the concept of “Peoples” appears in international law as a legal category.⁵ Human rights, including, importantly, social and economic rights, are stated at the very beginning of the Preamble (lines 2 and 4). As Cote and Pellet rightly observe, “*il est très remarquable à cet égard que, tout au long de la Charte, comme c’est le cas du préambule, tout disposition qui évoque les droits de l’homme traite aussi des problèmes économiques et sociaux.*”⁶

Despite this remarkable beginning, in which the draftsmen courageously sought to reach out to all of humankind, the focus returns to States in the closing sentence of the Preamble and governments are indicated as the subjects in charge of the rights and obligations of the Charter. Peoples are again referred to in Articles 1.2 and 55, in relation to the right of self-determination, but all other preambular provisions refer to States and governments. Perhaps, then, the Charter does begin with an overstatement, because governments remained the authors of the Charter and States the principal actors in the creation and implementation of United Nations law. Nevertheless, the Preamble is a charged text whose time has yet to come: it awaits the interpreter’s attention.⁷

Article 1.1, empowering the organization to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression, states the main objective of the United Nations as the maintenance of international peace and security.

Article 1.2 calls for the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. As evidenced by the number of independent States born from colonial regimes under the auspices of the organization, this has been one of the most productive areas of action of the United Nations. With the passage of time, however, and the action of new member States, the general principle of self-determination became a principle of *jus cogens*, stating the right to

independence of people subjected to foreign domination. No provision in the Charter deals extensively with colonial regimes. The document provides only for an international regime of trusteeship in Chapters XII and XIII. The principle of self-determination was recognized as a general principle, intended to protect nationalities from foreign aggression or domination

The purposes and principles stated in Article 1.3, to cooperate to achieve higher standards in the social, economic, and cultural domains and to encourage respect for human rights, have from the outset occupied a prominent place in the Charter, in contrast to the Covenant of the League of Nations, and have been reaffirmed in countless resolutions and declarations. This provision is interpreted as binding on all States. The obligation to promote and encourage respect for human rights and fundamental freedoms for all without distinctions appears to have reached the status of *jus cogens*, and the recent activity *extra vires* of the Security Council in situations where human rights were at stake seems to point in the same direction.

In the economic field, the United Nations has not achieved the success it has realized in the field of human rights. Following the failure of the Havana Convention of 1947, the most impressive results were achieved by international organizations not fully related to the United Nations, such as the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO). In Falk's opinion, the "logic [of the international economic organizations] is embedded in the well-being of capital rather than people."⁸ For too long, the United Nations was, he believes, "deliberately kept away from this global economic domain to ensure that normative claims about rectifying poverty and unemployment are not given any serious hearing on the global policy stage."⁹

Following on, for example, from the mandate in Article 55(c)—the obligation to promote universal respect for human rights—States developed a distinct branch of international law, international humanitarian law, that is increasingly invoked to require and justify intervention by the United Nations in cases of widespread violations. Actions by the United Nations in the humanitarian field were for long limited by another fundamental principle of the Charter, the principle of non-intervention in matters which are essentially within the domestic jurisdiction of any State (Article 2.7). Lately, however, especially after the fall of the Soviet Union and the socialist regimes (among the strongest supporters of the principle of non-intervention), and the rise of public awareness, respect for human rights is increasingly perceived as taking precedence over the protection of domestic jurisdiction in situations of extreme crisis.

In the result, the area covered by Article 39, in which the Security Council can determine the existence of any threat to the peace, breach of the peace or act of aggression and recommend or decide on measures to be taken by member States to maintain or restore international peace and security has been significantly extended by the need for humanitarian protection.¹⁰ This has reduced the reach of Article 2.7, except of course in the case of the involvement of one of the Permanent Members of the Security Council under Article 39, as happened in the 1982 Falkland/Malvinas war. As Ferrari Bravo puts it, if the practice of the Security Council continues along the lines followed in the last few years, humanitarian interventions may come to represent a decisive blow to the international system based on the classical concept of the sovereignty of States.¹¹

Article 2.7 was considered at the time of the creation of the United Nations to be a sacred, if not the highest principle of international law. However, the rise of other principles of international law has brought about a shrinkage in the traditional scope of domestic jurisdiction. This is strikingly evident when, for example, the protection of human rights is invoked. By recognizing the superior value of the protection of human rights, some old distinctions between internal and international war have been blurred. The cases of Somalia and Liberia are emblematic of this new development in the practice of the United Nations. In both, the existence of a civil war, which in traditional theory falls within the reach of Article 2.7, was defined by the Security Council as a situation capable of threatening international peace and security and therefore subject to resolutions under Chapter VII.¹² China, which has always considered the principle laid down in Article 2.7 as inviolable, supported the resolutions, considering the situation at hand a "unique situation" not constituting a precedent.¹³ Another remarkable example of this trend is Security Council Resolution 688 of April 15, 1991, which served as the basis for the intervention of member States in the domestic affairs of Iraq in order to terminate the violation of human rights perpetrated by the Iraqi government against the Kurdish population.¹⁴

Almost all the principles listed in Article 2 have achieved the status of *jus cogens*. After restating the sovereign equality of all members (Article 2.1), this article proclaims the duty of member States to fulfill in good faith the Charter's obligations (2.2), requires States to use peaceful means to settle international disputes (2.3), enjoins the threat or use of force against the territorial integrity or political independence of any State (2.4), and imposes on States the duty to give the United Nations every assistance in any action it takes in accordance with the Charter (2.5). Article 2 also imposes on the organization a duty to ensure that States that are not members of the United Nations act in accordance

with the principles laid down in the Charter (Article 2.6). This paragraph, which will be examined more closely below, is particularly relevant for purposes of ascertaining the constitutional value of the Charter.

The principle of the sovereign equality of the member States of the United Nations, affirmed in Article 2.1, is as old as international law. From the time of Grotius to the present day, jurists have declared that all independent States are equal in the eyes of the law. This theory was first developed at the end of the Middle Ages, sanctioned by the Peace of Westphalia, and strongly supported by developing States from 1945 onwards. General Assembly declarations and a number of treaties refer to the principle of sovereign equality as one of the bases for the right to development, the right to freely dispose of natural resources, and for the general condemnation of neo-colonialism in any form.

The fundamental duty to settle international disputes by peaceful means is proclaimed as one of the purposes of the organization in Article 1.1, but is stated as a general principle in Article 2.3. Article 33 provides an illustrative, non-exhaustive list of dispute settlement modes, adding that States may resort to other modalities as long as they are peaceful. The validity of this principle was reinforced by the Manila Declaration on the Peaceful Settlement of International Disputes, and a number of General Assembly resolutions. The fundamental importance of the principle of peaceful settlement is evidenced by the traditional emphasis on it in the great regional arrangements, such as the treaties establishing the Organization of American States and the Organization of African States, the many treaties on the protection of human rights and on arms control, the Disputes Settlement Understanding of the World Trade Organization, and, remarkably, the comprehensive provisions of Part XV of the 1982 Law of the Sea Convention.

Articles Revealing Substantial Constitutional Characteristics. Article 10 defines the functions and powers of the General Assembly as consultative and declaratory. Although the Assembly was not designed as a legislative organ, Article 10 empowers it to discuss any matter within the scope of the Charter. Furthermore, Article 13.1 confers on the General Assembly an unrestricted power to initiate studies and make recommendations for the purpose of promoting international co-operation in the political field and encouraging the progressive development of international law and its codification. Despite the fact that the United States, the most powerful member of the organization, abandoned its early liberal view of the quasi-legislative value of certain acts of the General Assembly when the United States lost its majority within the General Assembly,¹⁵ the Assembly has increasingly and successfully used the

means at its disposal to foster new developments in international law by convening international conferences and promoting the creation of new law instruments through resolutions.

Article 12 states a division of labour, and indeed a superiority, between the two main organs of the United Nations: while the Security Council is exercising its functions under the Charter in respect of a dispute or situation, the General Assembly must, in most cases, refrain from making any recommendation with regard to that dispute or situation unless the Security Council so requests.

Article 24 sets out the functions and powers of the Security Council. By conferring on the Security Council primary responsibility for the maintenance of international peace and security, the members made the Council the cornerstone of the system of international security established by the Charter.¹⁶ Virtually no limit is placed on the powers of the Security Council as long as, very importantly, the Council acts in accordance with international law including the provisions of the Charter itself. The Council exercises other specific powers with regard to the maintenance of international peace and security. However, as stated by the International Court of Justice in the *Namibia* case, the mention of specific powers does not exclude the general powers the Council enjoys in order to carry out its duties in accordance with the Charter.¹⁷

Under Article 25, member States agree to accept and carry out decisions of the Security Council, whether its decisions stem from specific or general powers, provided, in my opinion, the decisions of the Security Council in question are "in accordance with the present Charter."¹⁸ As will be referred to later, the extensive powers conferred on the Security Council raised worries on the part of the smaller States at the San Francisco Conference, but the virtual non-functioning of the Council during the Cold War period alleviated those particular concerns.¹⁹ They reappeared, understandably, with the extraordinary reactivation of the Security Council after 1989. The worries regarding the existence of an overpowering Council were well summarized by the statement of the representative of Zimbabwe on the sanctions against Libya: "Any approach that assumes that international law is created by majority vote in the Security Council is bound to have far-reaching ramifications which could cause irreparable harm to the credibility and prestige of the Organization, with dire consequences for a stable and peaceful world order."²⁰

Article 25 has even more constitutional relevance than Article 24. We see here that sovereign States have agreed to accept general policy decisions they may not have voted for, considering that only 15 of the 185 members of the United Nations sit on the Council. This problem has lately caused a renewal of demands for an enlargement of the membership of the Security Council and a

general reorganization of the structures of representation within which member States operate.²¹

The famous Chapter VII refers to action with respect to threats to the peace, breaches of the peace, and acts of aggression. This is the chapter where the constitutional nature of the Charter comes clearly into view, as it gives the United Nations, through the Security Council, the lead role in carrying out operations that may involve the use of force. States are deprived of the right to use force unless authorized to do so by the Council itself. The only exception to this rule is contained in Article 51, which allows the use of force in case of individual or collective self-defense.²²

Article 39 grants the Security Council authority to make the requisite determination about the existence of any threat to the peace and to “decide” what measures shall be taken to maintain or restore international peace and security. Article 41 lists a series of measures not involving the use of armed force that the Council may call on the members to apply in order to give effect to its decisions. Article 42 refers to measures involving the use of force that may be necessary to maintain or restore international peace and security. Until recently, however, no action was ever taken in line with the full procedures of Chapter VII, nor has the Military Staff Committee been able to work according to its mandate under Article 47.²³ When military operations were authorized, the armed forces involved were not placed under the control of the Security Council through an agreement between the State or States concerned and the United Nations under Article 43; such forces were controlled by the States which the Security Council requested to intervene.

The only two occasions in which Chapter VII was invoked to legitimize warfare actions by member States were the wars in Korea (1950–1952) and in Iraq (1990–). On both occasions, Chapter VII was used to “provide cover for geopolitical undertakings led by the United States.”²⁴ While the operation in North Korea was conducted under the United Nations flag, although managed by the United States and its allies, the operations in Iraq, once the authorization was granted, were conducted without space for the United Nations to monitor the intervention.²⁵ The success of the action in Iraq led to a resurgence of hope for an increase in the legitimate activity of the Security Council, but the circumstances of the Iraqi war were exceptional in comparison to the warfare situations with which the United Nations is usually involved—the Iraqi war was the exact kind of conflict envisioned by the drafters of the Charter. As Evans states, “the United Nations Charter was written retrospectively to avert another World War II, and in Saddam Hussein, the United Nations found a 1930s type aggressor.”²⁶

The only other significant precedent regarding the authorization of the use of force by one member State against another member State, not including complete warfare operations, was the request to the United Kingdom to enforce a naval blockade outside the port of Beira in Mozambique during the riots in South Rhodesia in 1966.²⁷ Article 43 obliges members to make available to the Security Council whatever assistance (armed forces, assistance, and facilities) the Council requires for purposes of maintaining international peace and security. This was to have been done by special agreements or agreements negotiated on the initiative of the Security Council. Interestingly, in view of the legal limbo NATO found itself occupying during the Kosovo crisis of 1999, and the present need to redefine NATO, which is a military alliance not a traditional regional arrangement, those agreements can be concluded between the Security Council and “groups of Members.”

Some authors find that several articles in Chapter VII give the Security Council a certain law-making capacity. For example, Kirgis affirms that “from the outset, the Security Council has had quasi-legislative authority . . . Articles 41 and 42, buttressed by Articles 25 and 48, clearly authorize the Security Council to take legislative action.”²⁸ This was also the opinion of distinguished participants at the San Francisco Conference, one of whom observed that the “Security Council is not a body that merely enforces law. It is law unto itself.”²⁹

Under-appreciated and under-utilized, until recently, have been the possibilities, inherent in Chapter VIII, which govern the functioning of regional arrangements or agencies under the Charter. Article 52 states that nothing in the Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional actions. Under Article 53, no enforcement action can be taken under regional arrangements or by regional agencies without the authorisation of the Security Council.³⁰

While Chapter VIII is frequently associated with the military activities of the United States in Guatemala in 1954, the Dominican Republic in 1960, and Cuba in 1960 and 1962, Secretary-General Boutros Ghali rightly pointed to wider possibilities when he underlined the “useful flexibility” of the system as a whole. In his 1992 report to the Security Council, *An Agenda for Peace*, he pointed out that “decentralization, delegation and co-operation with UN efforts could not only lighten the burden of the Council, but also contribute to a deeper sense of participation, consensus and democratization in international affairs.”³¹

In my opinion, Chapter VIII, although focused on collective security, in no way rules out regional cooperation in the economic, cultural, and social fields.

The recognition of regional arrangements and agencies within the UN system, and the implicit need to work out compromises between universalism and regionalism, is a striking example of the major constitutional features of the Charter of the United Nations, in this case a feature fully familiar to citizens of federal and confederal states.

Chapter XIV deals with the International Court of Justice, the principal judicial organ of the United Nations. Its statute is an integral part of the Charter itself. The precise mandate of the Court, which we should not overlook, is to decide in accordance with international law such cases as are submitted to it.

According to Articles 93 and 94, all member States of the United Nations are *ipso facto* parties to the Statute of the Court and must comply with the Court's decisions in any case to which they are party. However, the constitutional reach of these provisions is limited jurisdictionally; the Court is available only to States. Organs of the United Nations or of any other international organization cannot stand as a party. This leaves little if any room for jurisdictional control over acts of the organization, particularly over those of the Security Council. As Crawford observes, "there is in the Charter, an almost total lack of institutional means for implementing the principle of the rule of law on the part of individual Member States."³²

Two articles, Article 2.6 and Article 103, have particular relevance for purposes of revealing the constitutional significance of the Charter. Under Article 2.6, the organization "shall ensure that States which are not Members of the United Nations" act in accordance with the principles of the Charter as far as may be necessary for the maintenance of international peace and security. Article 103 provides for the superiority of Charter obligations over the obligations of members under other international agreements.

Article 2.6, together with Article 103, represents the strongest suggestion that the Charter of the United Nations may be seen as a constitutional charter, or at least as proof of the universal vocation of the organization itself. The acts of the organs of the United Nations reinforce this view by addressing "all states," not simply member States. On the other hand, the relevance of the universal vocation of the Charter is now perhaps academic, since almost every State in the world has joined the United Nations. The only relevant exceptions to universal membership are, for obviously different reasons, Switzerland and Taiwan, plus a limited number of microstates, such as the Holy See. Nowadays, the United Nations is virtually a universal organization and its Charter is the basic written rule of the international community.

Some also consider the formulation of Article 2.6 a further indication that other principles of that article are to be considered international customary law

and therefore applicable to all States regardless of their membership in the United Nations. Since the obligations to maintain international peace and security and to prohibit the use of force have achieved *jus cogens* status, the provisions of Article 2.6 themselves would not necessarily be required to impose first-order juridical obligations on third States, but would technically represent supplementary obligations, and, of course, a political objective for the organization.

Article 103, even more forcefully, assigns the Charter a quasi-constitutional relevance by giving it priority over any other treaty obligation that conflicts with the Charter. This article seriously impacts on the centuries-old rule of *pacta sunt servanda*, and affects the *res inter alios* principle as well. The fact is that the consequences of the implementation of this provision reverberate on third States that are also parties to treaties signed by member States. However, the quasi-universal coverage of the United Nations renders the practical effect of Article 103 less striking than previously.

A number of articles, such as Articles 32 and 35, deal with non-member States, whose participation in the work of the General Assembly and the Security Council has been encouraged. In line with legitimate concerns for openness, it was recognized early on that it would be detrimental to the success of the United Nations if significant segments of the world population (non-member States) were to remain excluded from its activities, and if the organization did not provide for participation by non-State actors, which are playing an increasingly important role in international relations.

The status of non-State participants in the work of the United Nations is different for entities with sovereignty and entities, such as NGOs and individuals, without sovereignty. Whereas the first category has traditionally been given a certain recognition by the General Assembly in the form of "observer status," the second has been accorded, as provided in Article 91 of the Charter, "consultative status" with ECOSOC. The question of the extent of NGO participation has not yet been solved.

Access to the Security Council has traditionally been governed by Article 32 of the Charter and Rule 39 of the Provisional Rules of Procedure of the Security Council. While Article 32 limits access in principle to States, Rule 39 allows access to the Council for persons whom it considers competent to supply it with information or otherwise assist in examining matters within its competence. In recent years the Council has been commendably flexible in encouraging contacts and consultations with non-governmental and inter-governmental organizations.

A further feature of the Charter that points in the direction of its constitutional vocation is the absence of any provision regarding the possibility of withdrawal from the organization. Although the question of withdrawal was discussed at San Francisco, where it was tacitly agreed that any State could voluntarily withdraw,³³ the only existing precedent on the subject seems to demonstrate the practical unlikelihood of such an action for any significant period of time.

In 1965, Indonesia declared its intention to withdraw from the United Nations and its delegation accordingly vacated its seat in the General Assembly. However, the following year the Indonesian government sent a note to the Secretary General informing him of its intention to recommence co-operation with the United Nations. In the result, Indōnesia was readmitted to the General Assembly without being obliged to pass through the admission procedures. The President of the General Assembly declared in front of the Assembly that, in his understanding, the Indonesian action had been a withdrawal from the cooperative duties of the members but not a withdrawal from the United Nations *tout court*. He concluded that the Indonesian "bond of membership" had been maintained during the period of absence.³⁴ As no objection to the President's statement was made, the Indonesian delegation simply reoccupied its seat. It seems, therefore, that the General Assembly did not consider a temporary unilateral withdrawal from the organization to be the kind of serious withdrawal contemplated by the Charter.

Acts of the General Assembly

As mentioned above, most basic principles of international law are included in the provisions of the Charter. Many of these principles were of necessity generally defined, with room left for interpretation. The General Assembly, almost from the outset, assumed the task of clarifying and interpreting these principles, sometimes elaborating on principles not yet established as international customary law, in an attempt to develop the law and harmonize State practice in the matter at hand.³⁵ Resolutions and declarations adopted by the General Assembly are not binding on States. However, the influence of the General Assembly has a long-term effect. Repeated discussion of principles of international law may gradually influence the *opinio juris* and consequently the actions of member States.³⁶

General Assembly actions have relevance in developing the formation of principles of general customary law by adding the significant weight of an interpretation shared by the vast majority of States.³⁷ When a resolution restates

and clarifies existing principles of the Charter or existing principles of international customary law, it means the majority of States consider the resolution's interpretation to be representative of the current *opinio juris* on the subject.³⁸ Furthermore, through the activity of the General Assembly, developing countries, which represent the majority of the members, have been able to introduce new concepts and create new standards of international law, thereby positively contributing to its expansion from a European-centered system to a more widely-based universalist system.³⁹

In the *Nicaragua* case, the International Court of Justice accepted the value of General Assembly resolutions: "This *opinio juris* [regarding principles of international customary law] may, though with all due caution, be deduced from *inter alia* . . . the attitude of the states towards certain General Assembly resolutions. . . . The effect of consent to the text of such resolutions cannot be understood as merely that of 'reiteration and elucidation' of the treaty commitments undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves."⁴⁰

General Assembly Resolutions Carrying Erga Omnes Principles. Among the more important declarations of the General Assembly that have dramatically developed the principles of the Charter and become rules of *jus cogens* or *erga omnes*, the following must be mentioned: (i) Declaration 217A (III) of 1948 proclaiming the Universal Declaration of Human Rights; (ii) Declaration 1514 (XV) of 1960 regarding the granting of independence to peoples under colonial domination; (iii) Resolution 2625 (XXV) of 1970, the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States; (iv) the related Resolution 3314 (XXIX) of 1974 on the Definition of Aggression; (v) Declaration 1803 (XVIII) of 1962 on Permanent Sovereignty over Natural Resources; (vi) Resolution 2749 (XXV) of 1970 on the Principle Applicable to the Seabed and Subsoil of the Oceans beyond National Jurisdiction; and (vii) Resolution 1962 (XVIII) of 1963, the Declaration of Principles Governing the Activities of States in the Exploration and Use of Outer Space.

In order to further illustrate the dramatic unfolding of the provisions of the Charter and the process by which extensive areas of contemporary international law have been developed and endowed with specificity without, however, abandoning their Charter-based foundations, I will comment briefly on the documents and changes referred to.

Resolution 217A (III) of 1948, Universal Declaration of Human Rights. The General Assembly proclaimed the Universal Declaration on Human Rights on December 10, 1948 as the "common standard of achievement for all peoples and all nations." It is now generally regarded as having achieved the status of *jus cogens*. Several other important statements, such as the Declaration on the Rights of the Child (Res. 1386 [XIV] 1959) and the Declaration on Racial Discrimination (Res. 1904 [XVIII] 1963), were issued by the Assembly at an early date.

The International Covenant of Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights were adopted by Assembly Resolution 2200 (XXI) of December 16, 1966, and both entered into force in 1976, ten years later. Together with the Universal Declaration of Human Rights, they represent the most important documents on human rights issued by the United Nations.

The two covenants have been ratified by a large number of countries, not all of them beyond suspicion of neglecting human rights. This, and the weaknesses of the control system established by the covenants, suggests that some States may have ratified the covenants to enhance their public image more than to advance human rights.⁴¹ Nevertheless, regardless of the reasons behind the ratifications or the state of application of the covenants in individual countries, the fact remains they are recognized by the majority of States as delineating the framework of action for the international community. In fact, their binding character, especially the *jus cogens* value of the Universal Declaration of Human Rights, confirmed by its frequent invocation by Security Council resolutions on, for example, interventions under Chapter VII of the Charter, makes them the basic standards of behaviour for the international community in the area of human rights.

The past two decades have witnessed a renewed effort by the General Assembly to advance the protection of human rights. Through a series of resolutions, it has contributed significantly to the promulgation of international treaties aimed at the suppression of apartheid, all forms of racial and sexual discrimination, the elimination of torture and genocide, and related areas. These major developments in the strengthening of international law since 1945 are rooted in and inextricably linked to both the Atlantic Charter of August 14, 1941, and the Charter of the United Nations, which, with its extensions, has established powerful new freedoms for citizens against their national sovereign States, thereby enhancing their individual autonomy.

Resolution 1514 (XV) of 1960, Declaration on Granting Independence to Colonial Countries and Peoples. Resolution 1514 (XV), passed on December 14, 1960, marked the most determined action of the General Assembly on the subject of self-determination. According to Cassese, the Declaration, "in conjunction with the Charter, contributed to the gradual transformation of the 'principle' of self-determination into a legal right for non-self-governing peoples."⁴² Several other declarations of the General Assembly, as well as the two covenants on human rights of 1966, consider the right of self-determination to be a basic right of peoples. The International Court of Justice expressed the same opinion in the *Namibia* case when it said that "the subsequent developments of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations made the principle of self-determination applicable to all of them."⁴³ Today this principle is regarded as *jus cogens*.

The activity of the United Nations in the field of self-determination and decolonization has been paramount. Almost all peoples under colonial domination before the establishment of the United Nations have achieved independence. The only major exception is Western Sahara, occupied by Morocco since 1975.⁴⁴

Resolution 2625 (XXV) of 1970, Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States, and Declaration 3201 (S-VI) 1974 on the Definition of Aggression. At the famous Bandung Conference of 1955, the non-aligned countries adopted the concept of peaceful coexistence and listed ten principles derived from it. Following fifteen years of discussion, initiated mainly by the Soviet Union and non-aligned countries, and the adoption of several resolutions regarding peaceful coexistence and friendly relations,⁴⁵ on October 24, 1970, the General Assembly finally adopted, by consensus, a Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. This Declaration lists seven principles, most of which are now considered *jus cogens*. They are:

- (a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other matter inconsistent with the purposes of the United Nations;

- (b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;
- (c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter;
- (d) The duty of States to cooperate with one another in accordance with the Charter;
- (e) The principle of equal rights and self-determination of peoples;
- (f) The principle of sovereign equality of States; and
- (g) The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter, so as to secure their more effective application within the international community and promote the realization of the purposes of the United Nations.

(a) The first principle is already included in Article 2.4 of the Charter. The main problem posed by the formulation of the principle was the definition of the use of force. The intention of the non-aligned States was to include economic and political coercion in the prohibition of the use of force. This view was opposed by western States and no definition of aggression was included in the Declaration. After much effort, the gap was filled by Resolution 3314 (XXIX) of 1974 on the Definition of Aggression, Article 1 of which defines aggression as the “use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.” The Resolution then defines an aggressor as the first State to use armed force. Article 3 lists acts qualifying as aggression. The list is not considered exhaustive, and the Security Council may decide whether other acts constitute an act of aggression.

(b) The principle of peaceful settlement of international disputes is drawn from Article 2.3 of the Charter. The Declaration on Friendly Relations might possibly clarify the principle, but seemingly without adding anything new. As affirmed by Daoudi, it “contains no new statement on this matter [the role and power of the organs of the United Nations in the settlement of international disputes] but it synthesizes the present state of development of the principle in international law.” Further refinements of the subject were achieved in the Manila Declaration on Peaceful Settlement of Disputes.⁴⁶

(c) Both the Declaration on Friendly Relations and the Resolution on the

Definition of Aggression condemn all forms of intervention, not just armed aggression, perpetrated directly or indirectly in the internal or external affairs of a State. The use of force in reprisal is also considered as illegal when not conducted by the Security Council or for self-defense.

To the principles outlined in the Charter of the United Nations, the Declaration adds two principles already considered in Resolution 2131 of 1965: the duty to refrain from the use of force to deprive peoples of their national identity, which is seen as a violation of their inalienable rights as well as a violation of the principle of non-intervention; and the duty to refrain from interference of any sort in the inalienable right of States to choose their own political, economic, social, and cultural systems without interference of any form.

(d) The duty to cooperate is again drawn from the Charter. Interestingly, economic cooperation is envisaged as a duty under both the Charter and the Declaration, while in subsequent resolutions, such as Resolution 3281 (XXIX) of 1974, it is seen as a right to economic cooperation.⁴⁷

(e) Self-determination was originally intended by the drafters of the Charter to refer to nationalities, not to peoples under colonial domination.⁴⁸ With the passage of time, the beneficiaries of the right to self-determination became peoples subjected to colonial, racist, or other forms of alien domination. Those people, when struggling against alien domination, enjoy the *jus ad bellum* to fight against a subject of international law, and are themselves granted the status of a quasi-subject of international law. They are entitled to seek and receive support in accordance with the purposes and principles of the United Nations Charter.

(f) The principle of sovereign equality restates in a more extensive manner the principle laid down in Article 2.1 of the Charter. It provides that all States are juridically and legally equal regardless of economic, social or political capacity.

(g) The duty of good faith in fulfilling Charter obligations is restated so as to emphasize the more effective application of those obligations within the international community.

As already mentioned, almost all these principles are recognized as part of international law. The General Assembly, as the principal legal forum of the international community, provided the framework within which the principles governing friendly relations among States were codified.⁴⁹ Important for present purposes is the inextricable linkage of the principles of peaceful coexistence to the Charter, into whose provisions they may or may not come to be imperceptibly merged. What I wish to underline, however, is that whether

independently or as elements of the Charter, those principles stand as prominent parts of the written constitution of the world.

In that the idea of peaceful coexistence is deeply rooted in the political and legal culture of the Peoples' Republic of China, a major actor on the international stage, one should not be too hasty in thinking that the idea of peaceful coexistence has lost independent validity and been folded into the Charter since the end of the Cold War. Given China's influence on the development of the international legal system, it behooves us to briefly consider the concept of peaceful coexistence in the context of world constitutionalism.

The first point to recall is that the basic constitutional document, the "Common Programme," made public at the time of the founding of the People's Republic of China, mentioned explicitly the principles of equality, mutual benefit, and mutual respect for each other's territorial sovereignty. Then, in 1954, the famous Pancha Shila Treaty between China and India referred to Five Principles essential for peaceful coexistence, including mutual non-aggression, mutual non-interference in each other's internal affairs, and equality and mutual benefits. The following year, at the Bandung Conference of Asian and African Countries, the participants formulated ten principles based on the essence of the Five Principles of Peaceful Coexistence which for China had come to express the basis for mutual friendly relations and peaceful coexistence.

Although the Five Principles of Peaceful Coexistence may not be totally novel if seen separately, in China's view their proposition as a whole set of rules guiding international relations has been unprecedented for the development of international law since the end of the Second World War. For China, they not only summarize concisely the purposes and principles of the Charter of the United Nations but also further develop them; they proclaim the principle of "equality and mutual benefit" as the code of conduct in relationships between States. The Charter speaks of "the promotion of the economic and social advancement of all peoples" without, of course, indicating what principles and methods are to be used to realize that objective. "Equality and mutual benefit" envisage economic and technological cooperation beneficial for both parties carried out among *all* States on the basis of sovereign equality, irrespective of size, power, or national income.

Since the Five Principles represent a basic national policy for handling China's relations with the outside world and a cornerstone of China's foreign policy, they are not regarded as a temporary expedient but, rather, as long-term policy reinforcing and slightly extending the provisions of the Charter of the United Nations. For present purposes, they reaffirm China's recognition of,

and commitment to, one single contemporary international law system applicable to all countries of the world based on the purposes and principles of the Charter as well as the Five Principles themselves. In 1984, Deng Xiaoping declared the Five Principles “the best means for handling relations between nations. Other forms, such as the ‘big family,’ ‘group politics’ and ‘spheres of influence’ would bring about contradictions and increase international tension.”

Declaration 1803 (XVIII) of 1962 on Permanent Sovereignty over Natural Resources. Resolutions and declarations are also used by the General Assembly to state principles that are not necessarily included in the Charter, although they may be derived from it, and are not yet established *opinio juris*. In this way, the General Assembly may successfully initiate a process of creating new norms. That was the case with the turbulent debates of the 1960s and 70s on permanent sovereignty over natural resources, which concerned the still-unresolved question of distributive justice in the world community.

Declaration 2749 (XXV) of 1970 on the Principle Applicable to the Seabed and the Ocean Floor, and the Subsoil thereof, Beyond the Limits of National Jurisdiction. This document represents a perfect example of the double effect of a resolution of the General Assembly in the law-creating process. Declaration 2749 declared the ocean seabed the common heritage of mankind and Resolution 2750 convened an international conference to codify a new regime for the ocean seabed. The area of concern for the conference was soon extended to cover virtually all marine related norms. Almost nine years after the conference began, the United Nations Convention on the Law of the Sea was adopted on December 10, 1982. By then, several of the norms laid down in the convention, such as the creation of the exclusive economic zone and the relative economic rights of coastal States, had already become principles of international customary law.

The system created by the Law of the Sea Convention and subsequent instruments is notoriously complex; it includes rules of procedure of a constitutional nature, such as the creation of a High Authority and a tribunal for the settlement of disputes. Further, one of the subsequent instruments, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 28 July 1994, expressly creates precise obligations *erga omnes*, binding also on non-members of the Convention.⁵⁰ I will return briefly to this vast topic under the heading “other constitutional orders,” below.

Resolution 1962 (XVIII) of 1963, Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space. An effect similar to the one obtained by Resolution 2549 regarding the law of the sea was realized by Resolution 1962 (XVIII) for the regime of outer space. Indeed, the regime of outer space acquired shape for the most part through the activity of the General Assembly. The 1966 Outer Space Treaty and nearly all subsequent international texts on outer space are based on General Assembly resolutions generated by the Committee on Outer Space.⁵¹ Whatever the particularism or partial autonomy of this field of law, as evidenced by the development of its own set of legislative instruments, it remains closely linked to the Charter of the United Nations which, we need to bear in mind, was made specifically applicable to space and outer space by the General Assembly. On this extended view, the constitutional reach of the Charter extends beyond planet earth to embrace the cosmos itself.

Recent Activities of the Security Council

Almost all recent interventions by the United Nations, and the Security Council in particular, have been justified by humanitarian concerns. Some of these interventions were not only against States but also against individual persons. The main critique of the activity of the Security Council in this particular field is that the acts in question seem to point in the direction of the establishment of new norms of international law despite the fact that nowhere in the Charter is the Council (or any other organ of the United Nations) endowed with law-making capacity. As Zemanek affirms, "The word 'measures' used in Articles 39, 41, and 42 of the Charter does not suggest that the Security Council may generate rules of general international law by decision."⁵² Yet this is exactly what the Council has done on several occasions since 1989.⁵³ The first legally doubtful act of the Council after the end of the Cold War was the delegation of the use of force in the intervention against Iraq.⁵⁴ More significant from a law-making point of view was the guarantee of the inviolability of the Kuwait-Iraq boundary⁵⁵ and the establishment of a Compensation Commission to solve the Kuwait claims against Iraq. An even more evident deviation from the usual prerogatives of the Security Council, and an action that can hardly find a basis in international law, was the request to Libya to surrender two of its nationals to other States' tribunals and the subsequent economic sanctions imposed under Resolutions 731 (1992) and 748 (1992).

The Council again used the instrument of resolution to establish an International Tribunal for the Prosecution of Persons Responsible for Serious

Violation of International Humanitarian Law Committed in the Territory of the Former Yugoslavia in Resolutions 808 (1993) and 827 (1993), and an International Tribunal for Rwanda in Resolution 955 (1994). The possibility of grounding these actions in Article 29 of the Charter does not seem to be available since it is not possible to consider the tribunals in question as mere subsidiary organs necessary for the performance of the Council's functions. The Council has neither a judicial or law-making function nor competence against individuals. However, no member of the United Nations has so far objected to this extension of the Council's activities. Only Brazil and China expressed concerns for the legality of the Council's action in establishing the tribunals but neither voted against the resolutions. China voted in favour of the establishment of the Tribunal for the Former Yugoslavia and abstained in the case of Rwanda.⁵⁶

The consolidation of this United Nations attitude regarding intervention in cases of human rights breaches is growing, along with another more problematic trend, the delegation of the use of force against a State to an individual State or group of States in the execution of Security Council decisions under Article 42. Since the end of the Cold War, delegations of power to member States have multiplied, and have been used to foster the multi-national intervention in the civil war in Somalia, the use of NATO forces in Bosnia-Herzegovina, and the U.S.-led intervention in Iraq. The legal validity of these actions has been questioned by scholars.⁵⁷ For some, the newly established trend seems to signify a shift in the role of the Council from the executive and operational role provided for it in Article 42 to a more directive role.⁵⁸

The lack of explicit dissent, according to the maxim *qui tacet consentire videtur*, seems to embrace the possibility of the formation of a new norm of international customary law, springing from the failure of the Chapter VII norms. However, despite the lack of formal dissent in the actual proceedings, one needs to note increasing concern on the part of less powerful States regarding the expanding sphere of action of the Security Council. As Bedjaoui notes, "The small and medium nations are again gripped by the fear which some of them had already expressed at San Francisco in 1945 when they saw danger in the sweeping powers that the Conference was ready to confer on the Security Council in the Charter then on the brink of adoption."⁵⁹

Bedjaoui goes on to argue that a major weakness in the United Nations system lies in the fact that no instrument to control the legality of the actions of its organs is available to member States. Zemanek underlines the same point as regards recent activities of the Security Council: "Since the Council started working properly after 1989, its permanent members, once they come to an

understanding among themselves, feel not really restrained in their decision-making by provisions of the Charter or by rules of international law if it suits their combined interests, and they are apparently able to persuade other Council members to fall into line.”⁶⁰

Other Constitutional Orders

I have already referred to regional arrangements or agencies and the inviting possibilities for decentralization, including the delegation of inter-governmental powers, that are inherent in the overall concept of order envisaged in the Charter of the United Nations. To complete the delineation of the legal landscape it is now necessary to say something about autonomous subsidiary legal orders. In this respect, I am unable at the present time to take even a cursory glance at the World Trade Organization, which is creating an economic constitution for the world. However, I will briefly refer to the United Nations Convention on the Law of the Sea, which represents a Constitution for the Ocean, and the European Union, which constitutes a novel juridical order of international legal character. Both must be taken into account in any portrayal of the nature and scope of the Charter.

Ocean Regimes. The Law of the Sea Convention, a milestone in the history of international relations, clarified or replaced much of the old law of the sea and introduced new concepts in international law.⁶¹

The Convention was adopted at the Third United Nations Conference on the Law of the Sea (1973–1982) in Montego Bay, Jamaica, on December 10, 1982, after nine years of negotiations. There were 130 votes for and 4 against the Convention, with 17 abstentions. The final act of the Conference was signed by some 150 States and entities, including the European Union. The convention entered into force on November 16, 1994.

Consisting of 17 Parts in 320 Articles, plus 9 Technical Annexes, the Convention is organized into three major divisions. The first, comprising Parts I–X, is territorial in character. It creates three new types of ocean space: the exclusive economic zone, the archipelagic State with its archipelagic water, and the international seabed area. “The Area” lies beyond the limits of national jurisdiction and is governed by “the Authority” on the basis of the principles of the Common Heritage of Mankind.

Part XI defines this regime with its combination of functional and territorial characteristics. It is “territorial” in that the Area is a territoriality to be delineated by boundaries, by the year 2004, ten years after the entry into force of the

Convention. It is “functional” insofar as the Authority exercises limited functions through exclusive rights, controlling and managing the exploration and exploitation of the natural resources of the Area and related activities, that co-exist with shared jurisdictions (scientific research) and with the rights of States in the Area (prospecting).

The third major division of the Convention comprises Parts XII through XV. It deals with the marine environment as a whole, with marine scientific research and technology development transfer, and with the peaceful settlement of disputes.

The Convention put an end to the old controversy regarding the width of the territorial sea—the limit of 12 nautical miles was accepted—and introduced a number of new features, such as the exclusive economic zone, the archipelagic zone, and the regime of transit through straits used for international navigation. It provided for the establishment of an International Tribunal for the Law of the Sea and defined the Area of seabed and subsoil beyond national jurisdiction.

The Area, considered under Part XI (Articles 136–191) and Annexes IV–IX of the Convention, is defined as the common heritage of mankind. Article 311.6 further underlines the importance of the Area by declaring that no State can be party to an agreement in derogation of Article 136. This article is not subject to amendment. Article 160 sets up an Assembly, comprising representatives of all members, for the management of the Area. An executive organ, a Council comprising 36 members, 18 coming from special interest States (the coastal States) and 18 chosen according to a geographic criteria, is provided for in Article 162. The Authority has a Secretariat for administrative matters and an Enterprise, its business arm,⁶² which deals with States in the granting of exploitation concessions. Jurisdictional authority for disputes among States or between States and the Authority regarding the Area rests with the 11-member Seabed Dispute Chamber of the 21-judge International Tribunal for the Law of the Sea.

As far as dispute settlement is concerned, States have been given the option to select their forum by written declaration. They may choose between the International Tribunal, the International Court of Justice, arbitration or special interpretation, failing which, or in the case of conflicting declarations, arbitration under Annex VII. Between 1984 and 1994 some 15 disputes on the law of the sea were referred to the International Court of Justice, arbitration, or another forum, such as a conciliation commission. As is well known, but bears repeating, the system for the peaceful settlement of disputes designed in Part XV

and the Annexes is the most comprehensive and binding system of its kind ever accepted by the international community.

On August 4, 1995, after three years of negotiation, the representatives of 96 countries at the United Nations conference on straddling fish stocks and highly migratory fish stocks concluded an Agreement for implementing the provisions of the Law of the Sea Convention of 1982 relating to their conservation and management. The reason for this further development of the Convention was that the division of duties between coastal States and flag States in the management of fish stocks moving between exclusive economic zones and the high seas was unclear in that it was subject to conflicting interpretations.

The 1995 Agreement stresses the duty of States to manage and protect fish stocks straddling between the high seas and areas under national jurisdiction in their entirety, not simply according to existing maritime boundaries.⁶³ The agreement places major emphasis on the utilization of regional organizations to achieve cooperation between coastal States and distant water fishing nations. Article 8.4 states that only States that are party to such organizations and those that agree to submit to the decisions of the organization should be allowed to fish in the area covered by the organization. This represents a significant exception to the regime of high seas fisheries, since it implies that even outside national jurisdictions, distant water-fishing nations are not permitted to operate without the consent of other States.

A further and even more significant breach of classical concepts on high seas fisheries regimes is found in Article 21 of the Agreement. Article 21 strengthens the role of regional organizations by giving States that are members of one of such organizations the right to enforce its rules even on those States not party to the organization but party to the 1995 Agreement.⁶⁴ In this case, a distant-water-fishing-nation loses its right to fish in the high seas "because of its commitment at the global level."⁶⁵

In summary, we can see that developments in the law of the sea over the last seventy years have followed the qualitative procedural change evolved in the twentieth century for its codification and progressive development through international consultations, negotiations, and agreements rather than through traditional unilateral means based on discovery, effective occupation, and national claims supported by political strength. Virtually all those developments, encouragingly positive and comprehensive, have taken place under the auspices of the United Nations and in light of the principles of the Charter and the Law of the Sea Convention of 1982. Just as the Charter of the United Nations stands as the mother constitution to the Law of the Sea Convention, the latter now stands as a constitution in its own right to the structure and process of

continuing refinements such as those in the 1995 Agreement on straddling and highly migratory stocks. The 1982 Convention is basically a framework convention: it is to be filled in by literally hundreds of geographically or functionally sectoral agreements already in existence or yet to be created. Further progressive development, adjustment, and crystallisation of all aspects of the law of the sea and sustainable ocean management will continue under the benign guidance of the overarching constitutional provisions referred to.⁶⁶

The European Union. The European Union, the first supranational organization in Europe, presents unique features.⁶⁷ Labeled the European Community until 1993, it differs from other international organizations because of the magnitude of its objectives and the effectiveness of its organs in the pursuit of those objectives. Today, the organization consists of three pillars. The first, the "European Community," incorporates the three "communities" established by the founding treaties (the European Coal and Steel Community, the European Atomic Energy Community, and the European Economic Community) and sets out the institutional requirements for the European Economic and Monetary Union. The other two, the "Common Foreign and Security Policy" and "Justice and Home Affairs," operate by intergovernmental cooperation rather than through community institutions.

The Community, which aims at the gradual integration of the economies of the members, is competent to regulate a wide range of matters relating to economic and social development.⁶⁸ The objective of the Founder States was to "promote throughout the Community a harmonious and balanced development of economic activities . . . sustainable and non-inflationary growth respecting the environment . . . a high level of employment and of social protection, [and] the raising of standards of living and quality of life."⁶⁹ To realize these objectives, the six Founder States agreed to delegate sovereign powers to the organs of the Community. In doing so, they granted the Community power to legislate, implement and, importantly, enforce, the regulations promulgated according to its competence. In this way, the effectiveness of the European Community in achieving the objectives of the treaty has been more successful than in the case of other international organizations.

After the establishment of the Common Market in 1992, two new treaties extended the range of areas to be covered by the Communities. The Treaty on the European Union, which was signed in Maastricht in 1992 and came into effect the following year, added to the list of objectives the strengthening of the economic and social cohesion and the establishment of an economic and monetary union.⁷⁰ The 1997 Treaty of Amsterdam underlined the need for a

consistent external policy and the development of a common foreign and security policy, as well as the further development of the monetary union and the social policy.

The main bodies of the Union involved in the decision-making process are listed in Article 4.1 of the Treaty of Rome: the European Parliament, the Council, the Commission, and the European Court of Justice.

The European Parliament is the only EU institution whose members are directly elected by national constituencies instead of being nominated by national governments; it thus represents European citizens.⁷¹ Its role in the Community decision-making system has developed from mainly advisory and consultative to a more active and effective one. According to Article 149, as amended by the Single European Act of 1987, Parliament exercises pressure on the work of the Council by refusing to accept or by amending provisions set in the Council "Common Position" by absolute majority. Since Maastricht, it has the right of co-decision in various areas of the Union's sphere of action, such as the common market and the protection of the environment.

The Council of Ministers is the EU legislative body. It is the only institution that can issue measures binding on all member States. As Parliament represents the peoples of Europe, the Council represents the governments; it is formed by the ministers of the members in charge of the subject under discussion. As a rule, the Council votes with a qualified majority,⁷² except in the case of the vote on a second reading of Parliament, or if the subject is considered of vital importance for one of the member States, in which cases it must decide by unanimity. Only the Council can adopt acts that are immediately enforceable in member countries.

The European Commission is the operative body of the Communities. Comprising 20 commissioners nominated by the member States, it operates independently from them.⁷³ The Commission is the body responsible for the management of the Community's policies and for the monitoring and enforcement of the implementation of those policies by member States and by their citizens. The main tasks of the Commission, as listed in Article 155 of the Treaty of Rome, are: to ensure that the provisions of the treaties and of European legislation are respected, by States and by individuals or organizations; to initiate the Community's actions by preparing proposals for Regulations to be adopted by the Council; to formulate recommendations or deliver opinions on subjects considered in the Treaty whenever asked or where it feels necessary to do so; to operate the Community's policies and manage the Community's structural funds; and to represent the European Union in its relations with third States and international organizations.

The European Court of Justice, although not directly involved in the decision-making process, is important in the development of Union policy. The Treaty of Rome, in Article 164, mandates the Court to “ensure that in the interpretation and application of [the] Treaty the law is observed.” In discharging this responsibility, the Court has been functional in developing the law regarding, for example, the division of powers between the Community and the States in several areas covered by the treaty, both on the external and internal level. The Court has jurisdiction over, and can order punitive measures in relation to, the acts of member States and the Commission with regard to the implementation of Community law. These rulings cannot be challenged, which is in marked contrast to the judicial powers of other international organizations, such as the United Nations, which do not have jurisdiction over the actions of international organs and whose decisions are only compulsory for those States expressly accepting the jurisdiction in question.

The European Council, formally recognized in the 1970s and first acknowledged in Community law in the Single European Act of 1986, comprises the Heads of States and Government of the European Union. It provides the Union with general political guidelines. The Presidency of the Council, assumed by each member for a period of six months, is in the main responsible for coordinating the work of the Council and managing the Common Foreign and Security Policy.⁷⁴

In the application of their competencies, community institutions have been provided with a number of legislative and jurisdictional instruments: regulations, issued only by the Council, which are binding and directly enforceable in the member States; directives, binding but not directly applicable in the member State, which must first be included in the national legislation through an apposite national law before becoming enforceable;⁷⁵ and recommendations and resolutions, which are not binding.

Areas in which the European Community can exercise its competencies are listed in the Treaty of Rome, as amended by subsequent treaties. However, this list is not exhaustive. According to Article 235, the Council can legislate in areas not covered by the letter of the treaty if such action should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and Article 100 empowers it to “issue directives for the approximation of such provisions laid down . . . in Member States as directly affect the establishment or functioning of the common market.” The principle laid down in these articles is clearly stated in Article 3b of the Treaty of Maastricht, which provides that, “in areas which do not fall within its exclusive competence, the Community shall take actions, in accordance with the

principle of subsidiarity, only and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”

The 1992 Treaty of Maastricht is the first legislative instrument to refer explicitly to the much talked about “principle of subsidiarity.” Until then, the Community did legislate in areas not explicitly covered by the treaty when it deemed it functional to the achievement of the objectives of the Community.⁷⁶ The Court of Justice, the supreme interpreter of the rule of law in the Community,⁷⁷ ruled on several occasions that the Community had power to legislate stemming from the need to accomplish the objectives of the Treaty.⁷⁸ According to Article 3b, member States retain sovereign rights in every area not explicitly covered by the treaties unless it is proved that a certain action can better be carried on at the European level.⁷⁹ However, the boundary between the competencies of the States and the Community is not well specified in the treaty and, since 1992, few road blocks have been placed in the way of the Community in areas not covered by the treaty, but “functional” to its objectives. This demonstrates once again that member States are willing to accept a larger role for the Community if that proves to be of advantage for their national interests as well.⁸⁰ It is one of the most relevant features of the European Community that the competencies of the organization can be modified by the mere practice of its organ, and legitimized by the ruling of its court, without having to amend the founding treaties.

The treaty of Maastricht also formalizes the doctrine of the *acquis communautaire*, by which the corpus of Community law is considered as established at the Community and national level. The European Communities Treaties and the European Union Treaty have been most appropriately called “a complementary constitution for each of the Member states, which, like their national constitution, structure their legal order.”⁸¹ Externally, the major consequence of the existence of an *acquis communautaire* is that any State aspiring to accede to the benefits of the European Union must also agree to yield to the existing rules and change its national legislation in accordance with them. This increases the capacity of the Union to influence the national policies of third States which, in their wish to enter the Community, must accept the political and economic conditions it poses and demonstrate that they have undergone significant changes in several areas in order to qualify for admission.

The European Union is recognized as the representative of member States in international relations in several areas under its internal competence. Its achievements in the economic field have made it a point of reference for

international agreements, such as NAFTA, and an irresistible pole of attraction for other States of Europe and the neighboring regions. Its development as an economic unity is already having effects in the international arena.

The member States and the Union have sought through the years to take a single common position in areas covered by the treaties, presenting the Community, represented by the Commission, as a credible actor in important international economic venues such as GATT and the WTO.⁸² The Union's role in other international institutions is often less marked; although it enjoys full membership in the FAO,⁸³ the Community occupies observer status in the majority of the other UN bodies. Despite the reforms indicated in the Amsterdam Treaty, the Union still lacks a strong common foreign policy; indeed, member States still retain most of their sovereign powers in this area. However, the trend seems to indicate stronger integration in various fields, such as the Single European Currency and the harmonization of national legislation. The impact of the Union both internally and in the international arena is unprecedented, and its supranational character effectively and undoubtedly established.⁸⁴

Concluding Remarks

In light of the foregoing—the structure and architecture of the organization, the fundamental principles of the Charter and their development by the great foundation texts of the last fifty years, the interpretations of the International Court of Justice, the practice of States and international organizations, the opinions of qualified commentators, the attitudes of the publics of the world to the United Nations as part of a flow of policy-making activity, and, not to be underestimated, the *longue durée* of the historical processes at work since the middle of the 19th century—we can now return to the question posed at the outset: is the Charter of the United Nations a world constitution, *de facto* if not *de iure*, or perhaps *in fieri*?

Not surprisingly, the interpretative community of the international legal profession answers this question in different ways.

While most scholars acknowledge the prominence of the Charter above other conventional instruments and recognize that it contains several norms of *jus cogens*, many do not believe that it has more significance than that of a treaty, even though it is more far-reaching than any other treaty. While the United Nations is generally considered “the most important international organization for the maintenance of peace and security which has been established in modern history,”⁸⁵ many scholars remain reluctant to recognize the Charter as other than a historic instrument founding a permanent system of

general security. Rao emphasizes a widely held view when he says that, although the tasks of the organizations are far-reaching and of a global nature, "the United Nations has not been conceived as a world government, nor could transform itself into one."⁸⁶ The lack of effective capacity of United Nations organs to impose their decisions on the members and the absence of any mechanism to juridically review their acts are almost universally seen as serious problems for the constitutional perspective.⁸⁷

The distinguished Italian jurist Arangio-Ruiz, now a judge of the United States-Iran Claims Tribunal in The Hague, answers the question posed rather negatively. In a recent article, he does not exclude a priori the possibility that sometime in the future the United Nations may develop into something more on the lines of a confederation or a federation. For the time being, however, he sees the United Nations as a mere union of States, subordinate rather than superior to its members.⁸⁸ On the same line is Conforti, who sees the Charter as a treaty, not binding on third States, and the United Nations as a voluntary community.⁸⁹ James Crawford, Whelwell Professor at Cambridge, although recognizing the existence of several constitutional traits in the Charter which have the potential to make it a constitutive act, also notices the constitutional inadequacies of the Charter itself and suggests that it can be considered a starting point towards the development of a constitution for the international community.⁹⁰

Somewhat in the middle is Picone, who sees the United Nations as having a double nature in the international system. On the one hand, it is a traditional international organization, with forms and modalities defined by the Charter. On the other, it acts, in specific cases, as an organ of the international community, able to guarantee to the States operating *uti universi* in the defense of rules *erga omnes*, a further layer of legitimization.⁹¹

Other influential commentators have little doubt that the Charter is a world constitution. For Dupuy, the vocation of the Charter is to serve as "the text of reference"⁹² when international law is analyzed, the Charter being "at the same time the basic covenant of the international community and the world constitution. . . [it is the] world constitution, already realized and still to come."⁹³ Others perceive the Charter as a global constitution, *in fieri*. In a similar vein, Mosler quite rightly envisions the "trend of history [as going] towards relative sovereignty."⁹⁴ An even stronger stand is taken by Tomuschat, who affirms that "the Charter is nothing else than the constitution of the international community . . . not to be compared to any other international instrument."⁹⁵

However perceived, doctrine agrees that the Charter is a treaty establishing the most comprehensive framework of cooperation in the history of international relations. The importance of the organization as a permanent forum for

multilateral diplomacy, and the moral as well as legal strength of the Charter as the only comprehensive covenant common to the universality of States, is undoubted. In my opinion, the Charter is not only the most important document of the twentieth century, it is indeed one of the most important texts in the history of humankind; it stands as a steady light at the apex of the international legal system giving guidance and inspiration to the life of "the great community, the universal commonwealth of the world."⁹⁶

What then are the implications of the constitutional perspective of the Charter of the United Nations and its extensions? The truth is that we have only begun to examine them. While this vast terrain cannot be explored in this paper, it needs to be emphasized, in conclusion, that even a brief overview of the provisions of the Charter and its extensions indicates that the constitutionalization of the principles of the Charter is in line with the inclusionary ideals embodied in democratic constitutions and that legal supranationalism can be understood as a complementary common feature of national constitutional traditions. Supranational constitutionalism is therefore to be understood as a fundamentally democratic concept. It is a partial alternative, an addition, to the model of the constitutional nation-State; which respects the State's constitutional legitimacy, but at the same time clarifies and sanctions the commitments arising from its interdependence.⁹⁷

In this essay I have tried to demonstrate that the constitutionalization of the principles of the Charter of the United Nations is well under way and that the process has important implications for the reconceptualization of our subject. I hope colleagues will react to the challenge presented by the emergence of international constitutionalism in a non-statal world, and contribute to the exploration of this topic in the future.⁹⁸

Notes

1. See especially HERMANN MOSLER, *THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY* (The Hague: Sijthoff & Noordhoff, 1980). On the Europeanization of domestic legal systems in Europe, see Christain Joerges, *European Challenges to Private Law: On False Dichotomies, True Conflicts and the Need for Constitutional Perspective*, 18 *LEGAL STUDIES* 146 (1998).

2. Benedetto Conforti rightly observes: "One might say that the Charter was born in a certain sense as a constitution granted (*octroyée*) [by the Great Powers]. The basic outline sketched at Dumbarton Oaks was presented as unchangeable. Although the Conference could decide by majority (two-thirds) on the wording of the individual articles, the participants knew that any substantial change in the Dumbarton Oaks proposals would have resulted in the rejection by the Great Powers, or by some of them, of the new Organization." BENEDETTO

CONFORTI, *THE LAW AND PRACTICE OF THE UNITED NATIONS* (The Hague: Kluwer Law International, 1996), pp. 4–5.

3. KARL ZEMANEK, *THE LEGAL FOUNDATIONS OF THE INTERNATIONAL SYSTEM* (The Hague: Martinus Nijhoff, 1997), p. 47. See also MARIO GIULIANO, TULLIO SCOVAZZI, TULLIO TREVES, *DIRITTO INTERNAZIONALE* (Milano: Giuffrè, 1991), p. 238; R. St. J. Macdonald, *The Charter of the United Nations and the Development of Fundamental Principles of International Law*, in *CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF GEORG SCHWARZENBERGER ON HIS 80TH BIRTHDAY* (London: Stevens, 1988), p. 196.

4. Quizhi He, *The Crucial Role of the United Nations in Maintaining International Peace and Security*, in Christian Tomuschat (ed.), *THE UNITED NATIONS AT AGE FIFTY, A LEGAL PERSPECTIVE* (The Hague: Kluwer Law International, 1995), p. 80.

5. This origin, clearly recalled by the rapporteur of the First Committee of the First Commission on June 13, 1945, is also reported in JEAN-PIERRE COT ET ALAIN PELLET, *LA CHARTE DES NATIONS UNIES, COMMENTAIRE ARTICLE PAR ARTICLE* (Paris: Economica Bruylant, 1985), p. 18. See also, Raymond Ranjeva, *Peoples and National Liberation Movements*, in Mohammed Bedjaoui (ed.), *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS*, (Dordrecht: Martinus Nijhoff, 1991), pp. 101–112.

6. Jean-Pierre Cot and Alain Pellet, *Préambule*, in COT ET PELLET, note 5, p. 15.

7. See in particular RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940–1945* (Washington D.C.: The Brookings Institution, 1958), p. 910 (explaining the reasons for the ambiguities in the Preamble); HANS KELSEN, *THE LAW OF THE UNITED NATIONS*, (London: Stevens, 1950), pp. 3–11; Christof Heyns, *The Preamble of the United Nations Charter: The Contribution of Jan Smuts*, 7 *AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 329 (1995); BENGT BROMS, *THE UNITED NATIONS* (Helsinki: Suomalainen Tiedekäme, 1990), pp. 49–51; Bruno Simma (ed.), *THE CHARTER OF THE UNITED NATIONS* (Oxford: Oxford University Press, 1994), p. 45. Hans Georg Gadamer reminds us that “Every age has to understand a transmitted text in its own way.” The text lacks meaning until it is interpreted; and it makes a difference who the interpreter is. HANS GEORG GADAMER, *TRUTH AND METHOD* (G. Barden and J. Cumming trans., 2nd ed., 1975), p. 263.

8. Richard Falk, *Explaining the UN's Unhappy Fiftieth Anniversary: Towards Reclaiming the Next Half-Century*, in Ron Wheeler and Howard McConnell (eds.), *SWORDS AND PLOWSHARES: THE UNITED NATIONS IN TRANSITION* (Toronto: Canadian Scholar's Press, 1997), p. 22.

9. *Ibid.*, p. 22.

10. Giuseppe Cataldi, *Il Consiglio di Sicurezza nel nuovo scenario internazionale: prospettive di riforma nella struttura e nelle procedure*, 48 *COMUNITÀ INTERNAZIONALE* 683–700 (1993).

11. Luigi Ferrari Bravo, *Prospettive del Diritto Internazionale alla fine del secolo XX*, 74 *RIVISTA DI DIRITTO INTERNAZIONALE* 528 (1991).

12. CONFORTI, note 2, chapter 3, sec. II.

13. See, on the behaviour of China during recent developments in the Security Council, Ron Wheeler, *China, the UN and National Sovereignty. Drawing the Line on Supranationalism?* in Ron Wheeler and Howard McConnell (eds.), note 8, pp. 33–49.

14. Girolamo Strozzi, *I “principi” dell'ordinamento internazionale*, in 47 *COMUNITÀ INTERNAZIONALE*, p. 184ff (1992); Michael N. Schmitt, *Clipped Wings: Effective and Legal No-fly Zone Rules of Engagement*, 20 *LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW JOURNAL* 727 (useful discussion emphasizing that Resolution 688 neither mentioned Chapter VII nor specifically authorized establishment of no-fly zones). These zones “more closely

resemble humanitarian intervention mounted by multinational forces in response to a threat to international stability" (p. 736).

15. See on this subject, among others, Johan Kaufmann, *Developments in Decision-Making in the United Nations*, in Richard A. Falk, Samuel L. Kim, Saul H. Mendlovitz (eds.), *THE UNITED NATIONS AND A JUST WORLD ORDER* (Boulder: Westview Press, 1991), p. 130ff.

16. Rene Degni-Sagui, *Article 24, paragraphes 1 et 2*, in COT ET PELLET, note 5, p. 451ff.

17. ICJ REPORTS, 1971, p. 54ff.

18. For a discussion of the case itself see, among others, Benedetto Conforti, note 2, p. 4, p. 253ff.; Degni-Sagui, note 16, p. 452ff.

19. MOHAMMED BEDJAOUI, *THE NEW WORLD ORDER AND THE SECURITY COUNCIL. TESTING THE LEGALITY OF ITS ACTS* (Dordrecht: Martinus Nijhoff, 1994), p. 5.

20. UN Doc. S/PV.3063, at pp. 54–55.

21. Frederic L. Kirgis, Jr., *The Security Council's First Fifty Years*, 89 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 517ff. (1995).

22. ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* (Oxford: Clarendon Press, 1994), chapters 14 and 15.

23. Benedetto Conforti, *In tema di azioni del Consiglio di Sicurezza a tutela della pace e della sicurezza*, 48 *COMUNITÀ INTERNAZIONALE* 701 (1993); Falk, note 8, p. 23.

24. Falk, note 8, p. 23.

25. Pemmaraju Sreenivasa Rao, *The United Nations and International Peace and Security—An Indian Perspective*, in Tomuschat (ed.), note 4, p. 161.

26. In that the aggression was provoked, it trespassed recognized international borders and was carried on by the army of a member State invading another member State, in a region involving vital interests of the main powers. Gareth Evans, *The New World Order and the United Nations*, in Mara R. Bustelo and Philip Alston (eds.) *WHOSE NEW WORLD ORDER? WHAT ROLE FOR THE UNITED NATIONS?* Centre for International Public Law, (Sidney: Federation Press, 1991), p. 5ff.

27. Conforti, note 23, p. 704.

28. Kirgis, note 21, p. 520. Kirgis considers as legislative actions those being unilateral in form, creating or modifying part of a legal norm of general nature. Actions such as economic sanctions are unilateral because they are adopted by the Security Council instead of the generality of States, are binding, and not directed to a particular State but general in nature.

29. JOHN FOSTER DULLES, *WAR OR PEACE* (New York: MacMillan, 1950), p. 194.

30. Simma, note 7, p. 679; Joachim Wolf, *Regional Arrangements and the UN Charter*, in Rudolf Bernhardt (ed.), *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, Installment 6 (1983), p. 289; Sergio Gonzalez Galvez, *The Future of Regionalization in an Asymmetrical International Society*, in Ronald St. J. Macdonald and Douglas Johnson (eds.), *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* (The Hague: Martinus Nijhoff, 1986), p. 661; Ronald St. J. Macdonald, *The Developing Relationship between Superior and Subordinate Political Bodies of the United Nations and the Organization of American States*, 2 *CANADIAN YEARBOOK OF INTERNATIONAL LAW* 21 (1964). This essay ends with the statement (p. 54) that "there is a certain inevitability about the articulation and acceptance of effective standards on review and supervision, and one can't avoid thinking that, had Chapter 8 not appeared in the Charter, the Organization's practice would have created it nevertheless." I believe that as firmly in 2000 as I did in 1964; see also Russel, note 7, p. 693ff.

31. As quoted by Neri Sybesma-Knol, *The Continuing Relevance of the Participation of Observers in the Work of the United Nations*, in Karel Wellens (ed.), *INTERNATIONAL LAW:*

THEORY AND PRACTICE. ESSAYS IN HONOUR OF ERIC SUY (The Hague: Martinus Nijhoff, 1998), p. 371 at 385 (with full notes).

32. James Crawford, THE CHARTER OF THE UNITED NATIONS AS A CONSTITUTION, in Hazel Fox (ed.), *The Changing Constitution of the United Nations*, (London: British Institute of International and Comparative Law, 1997), p. 12.

33. Felicetta Leanza Lauria, *Il recesso dall'Organizzazione delle Nazioni Unite: il caso dell'Indonesia*, in 20 DIRITTO INTERNAZIONALE 153–174 (1966); Mario Scerni, *Aspetti giuridici del Ritiro delle Nazioni Unite* in 20 COMUNITÀ INTERNAZIONALE, 228 (1965).

34. United Nations Press Release GA/3210 of September 28, 1966.

35. The status of declarations of the General Assembly in the international law system is debatable and has produced a vast literature. See, among others, ZEMANEK, note 3; CONFORTI, note 2; GIULIANI-SCOVAZZI-TREVES, note 3; Richard Falk, *The quasi-legislative Competence of the General Assembly*, 90 AMERICAN JOURNAL OF INTERNATIONAL LAW 782 (1996).

36. Herny G. Schermers, *International Organizations*, in Bedjaoui, note 5, p. 79ff.

37. This opinion is shared by the majority of scholars. See, among others, CONFORTI, note 2, p. 282ff.

38. ZEMANEK, note 3, p. 49ff.

39. Christopher C. Joyner, *The United Nations as International Law-Giver*, in Oscar Schachter and Christopher C. Joyner (eds.), THE UNITED NATIONS AND INTERNATIONAL LAW (New York: Cambridge University Press, 1997), p. 440ff.

40. International Court of Justice, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua vs. U.S.)*, in ICJ REPORTS, 1986, pp. 14–150, para. 188. For further elaboration on the significance of the Court's judgment with regards to General Assembly resolutions, see Ronald St. J. Macdonald, *Fundamental Norms in Contemporary International Law*, 25 CANADIAN YEARBOOK OF INTERNATIONAL LAW 130ff. (1987); ZEMANEK, note 3.

41. CONFORTI, note 2, p. 245.

42. ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* (New York: Cambridge University Press, 1995), p. 70.

43. ICJ REPORTS, 1971, p. 31, para 52.

44. For more extensive discussion of these cases, as well as other disputed areas, such as the Falkland Islands and Gibraltar, see CASSESE, note 42, chapter 9.

45. See, for instance, Resolution 1815 (XVII) of 1962, and Declaration 2132 of 1965.

46. Resolution 37/10 of 1982.

47. Riad Daoudi, *Promotion of Friendly Relations by International Organizations*, in Bedjaoui (ed.), note 5, p. 492.

48. Cassese, *Article 1 paragraphe 2*, in Cot and Pellet, note 5, p. 42.

49. Daoudi, note 47, p. 496.

50. See on this subject Jost Delbrück, *Laws in the Public Interest—Some Observations on the Foundations and Identification of erga omnes Norms in International Law*, in Volkmar Götz, Peter Selmer, Rüdiger Wolfrum (Hrsg.), LIBER AMICORUM GÜNTER JAENICHE - Zum Beispiel Giebertstag (Max Plank Institut, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Band 135) (Berlin, Springer, 1998), p. 27.

51. The Treaty on Principles Governing the Activities of Space in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty) of December 19, 1966, was adopted by the UN General Assembly in Resolution 2222 (XXI) of December 19, 1966, UN Doc. A/6316. Among the other several international instruments developed through the "legislation by resolution" of the General Assembly, the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into

Outer Space (Dec. 19, 1967) in A/RES/2345 (XXII) 1967, the Convention on International Liability for Damage Caused by Space Objects (Nov. 29, 1971) in A/RES/2777 (XXVI), the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Dec. 5, 1979) in A/RES/34/68. Regarding the activity of the General Assembly and the Committee on Outer Space on the subject, see Ralph G. Steinhard, *Outer Space*, in Oscar Schachter and Christopher C. Joyner (eds.), UNITED NATIONS LEGAL ORDER (Cambridge: Grotius Publications, Cambridge University, 1995), vol. 2, pp. 753–787.

52. ZEMANEK, note 3. p. 203.

53. Conforti, note 23, p. 703; Giorgio Gaia, *Reflexions sur le role du Conseil de Securité dans le nouvel ordre mondial. A propos des rapports entre maintin de la paix et crimes internationaux des Etats*, 97 REVUE GENERAL DE DROIT INTERNATIONAL PUBLIQUE 297–320 (1993).

54. Giorgio Burci, *L'azione del Consiglio di Sicurezza delle Nazioni Unite nella crisi del Golfo*, in 46 COMUNITÀ INTERNAZIONALE 278–315 (1991); Kirgis, note 21, p. 520ff.

55. In Council Resolution 687/1991. The representative of United States, which was the main supporter State of the resolution, hastened to declare that “certainly the United States does not seek, nor will it support, a new role for the Security Council as the body that determines international boundaries.” Quoted in BEDJAOUI, note 19, p. 42.

56. ZEMANEK, note 3, p. 205 (footnote).

57. Among others, BEDJAOUI, note 19.

58. Conforti, note 23, p. 706.

59. BEDJAOUI, note 19, p. 5.

60. ZEMANEK, note 3, pp. 93–94.

61. Satya N. Nandan, *Introduction to the Law of the Sea*, in Bedjaoui (ed.), note 5, p. 839.

62. ELIZABETH MANN BORGESSE, *THE OCEANIC CIRCLE: GOVERNING THE SEA AS A GLOBAL RESOURCE* (Tokyo: United Nations University Press, 1998); S.P. Jagota, *The Seabed Outside the Limits of National Jurisdiction*, in Bedjaoui (ed.), note 5, p. 931.

63. Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, A/CONF. 164/33, August 3, 1995, art. 7.2

64. “In any high seas area covered by a subregional or regional fisheries management organization or arrangement, a State Party which is member of, or participant in, such organization or arrangement, may, through its duly authorised inspectors, board and inspect . . . fishing vessels flying the flag of another State party to this agreement, whether or not such State Party is also a member of, or a participant in, the organization or arrangement for the purpose of ensuring compliance with conservation and management measures for straddling stocks and highly migratory fish stocks established by that organization or arrangement.” *Ibid.*, art. 21.1.

65. Moritaka Hayashi, *The 1995 Agreement of the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention*, in 29 OCEAN AND COASTAL MANAGEMENT 61 (1995).

66. S. P. Jagota, *Developments in the Law of the Sea Between 1970 and 1998*, 2 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW (1999), forthcoming; S.P. Jagota, *Asia and the Development of the Law of the Sea: 1983–1992*, in Ronald St. J. Macdonald (ed.), *ESSAYS IN HONOUR OF WANG TIEYA* (Dordrecht: Martinus Nijhoff, 1994), p. 367.

67. According to Mosler, the term supranational was first used and defined in the negotiations which followed the Shumann Plan for the establishment of a European Coal and Steel Community. MOSLER, note 1, p. 188. The supranationalism of the Coal and Steel Community was more marked than that of the European Economic Community, and the powers given to the High Authority of the Coal and Steel Community were broader than those later granted to its EEC correspondent, the European Commission. In consideration of the wider area

of intervention and the more complex matters included in the Treaty of Rome, encompassing economic and social concerns, States were less ready to renounce their sovereign powers in favour of a supranational authority working too independently from them.

68. The Member States, "anxious to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions . . . establish among themselves a European Economic Community . . . to promote . . . a harmonious development of economic activities." Treaty of Rome, 1957, Preamble and arts. 1–2. The Treaty on the European Union (1992) "marks a new stage in the process of creating an ever closer union among the people of Europe" (art. A).

69. Treaty establishing the European Economic Community (The Treaty of Rome), Rome, March 25, 1957, in *TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AS AMENDED BY SUBSEQUENT TREATIES* (London: HMSO, 1988), art. 2.

70. Treaty on the European Union, *TREATY OF ROME CONSOLIDATED AND THE TREATY OF MAASTRICHT*, (Sweet and Maxwell, 1992), art. B. The European Union is "founded on the European Communities, supplemented by the policies and forms of co-operation established by . . . [the] Treaty" (art. A); it is not therefore replacing the European Community, which is maintained as the official denomination for what the common policies and the common market are concerned.

71. "The representatives in the Assembly of the peoples of the States brought together in the Community shall be elected by direct universal suffrage." Council Decision and Act of September 20, 1976, art. 1.

72. See Treaty of Rome, Art. 43 ff. Up to 1994, only 14 percent of the entire body of legislative acts of the Council have been voted by qualified majority, while in the great majority of the cases, the Council prefers to adopt these measures at unanimity, according to the so-called "Luxembourg compromise" of 1966.

73. "The member of the Commission shall, in the general interest of the Communities, be completely independent in the performance of their duties . . . In the performance of these duties, they shall neither seek nor take instructions from any government." Single European Act, art. 10.

74. Clive Archer and Fiona Butler (eds.), *THE EUROPEAN COMMUNITY: STRUCTURE AND PROCESS* (New York: St. Martin's Press, 1996), p. 44ff.

75. The States often do not promptly adopt such laws, thus causing several delays in the implementation of the Community's Policies. Some States have adopted legislative measures to avoid excessive delays in the implementation of European directives. The Italian Parliament, for instance, decided to provide for an annual European Law, which automatically allows all the directives that have not been converted in the previous year, to be made effective at the local level of administration.

76. Paul Taylor, *Prospects for the European Union*, in Stelios Stavridis (ed.), *NEW CHALLENGES TO THE EUROPEAN UNION: POLICIES AND POLICY-MAKING* (Brookfield: Aldershot, 1997), pp. 13–41.

77. DIARMUID ROASSA PHELAN, *REVOLT OR REVOLUTION: THE CONSTITUTIONAL BOUNDARIES OF THE EUROPEAN COMMUNITY*, (Dublin: Round Hall Sweet & Maxwell, 1997), p. 27, quoting W.G. van der Meers.

78. The most evident effect of this doctrine is in the recognition of the capacity of the Community to enter into international treaties on behalf of member States. According to the Court, wherever the European Community has internal power to legislate, it also has the corresponding external power to enter into treaties, while the Member States have no longer the

right to do it, even if the Community has yet to exercise its internal powers. See, for instance, Opinion 2/91 *Re Convention No. 170 of the International Labour Convention*.

79. Carolyn Rhodes, *Introduction: The Identity of the European Union in International Affairs*, in Carolyn Rhodes (ed.), *THE EUROPEAN UNION IN THE WORLD COMMUNITY* (Boulder: Lynne Rienner Publishers, 1998), pp. 1–17.

80. Moshe Mahor, *Towards Political Union: Assessing Two Strategies of EPU*, in Stavridis (ed.), note 76, pp. 43–66.

81. PHELAN, note 77, p. 145, quoting Bruno de Witte.

82. The European Commission has represented the member States in the GATT since at least the 1960s, as they realized immediately that their relative weight in negotiation would be greatly increased by creating a united front. The European Union also greatly contributed to the formulation of the WTO agenda. Fraser Cameron, *The European Union as a Global Actor: Far from Pushing Its Political Weight Around*, in Rhodes (ed.), note 79, pp. 19–43.

83. The Community has thus been since the early stages mainly responsible for the agricultural policy of its members. The FAO constitution had to be changed to allow the Community to join. Interestingly enough, Article II.4 (revised) now provides for admission of “regional organization constituted by sovereign states . . . to which its Member States have transferred competencies,” thus making possible for other regional organizations with similar competencies to be admitted.

84. Koen Lenaerts and Eddy De Smÿter, *The United Nations and the European Union: Living Apart Together*, in Wellens (ed.), note 31, p. 439.

85. Qizhi He, note 4, p. 77.

86. Rao, note 25, p. 182.

87. CONFORTI, note 2, p. 13 ff.; Crawford, note 32, p. 8ff.; Rao, note 25.

88. In the article, Arangio-Ruiz focuses on the recent activities of the UN organs, and the Security Council in particular, in order to defy the analogy between a federal system and the system established by the Charter, an analogy that has been extensively used to justify (under the doctrine of implied powers) the unchecked expansion of the range of activities of the Security Council. Arangio-Ruiz considers this analogy marginally justified with regard to peace-keeping operations, which are “carried out by the organization under the legal cover not so much of the Charter, but of more or less special agreements with the state(s) whose territory or people are to be affected.” Otherwise, the federal analogy is, in his opinion, “undemonstrated and implausible.” Although he recognizes that the United Nations has had a significant impact on the rules of inter-State relations among members, he finds several pitfalls in the conception of the Charter as a constitution. The United Nations as created by the Charter has no direct power on the peoples of the Member States, and the peoples themselves had no role in the foundation of the United Nations and still have no voice in the procedures of the organization. Moreover, the international system gives no room for a change in the distribution of powers among the States, being the differences of political economic and military powers among members tendentially permanent, and the organs of the United Nations are composed of delegates of States, and are therefore not independent in their decisions. The author looks with alarm at the increasing tendency of certain States to operate *uti universi* on behalf of the United Nations and the entire international community, without control. He considers the application of the doctrine of implied powers to the actions of the Security Council as a dangerous trend that could be used by certain States to use the United Nations as an instrument of their own foreign policy, with the risk of undermining the future of the organization. Gaetano Arangio-Ruiz, *The Federal Analogy and UN Charter Interpretation: A Crucial Issue*, 8 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 1–18 (1997).

89. CONFORTI, note 2, p. 10.

90. Crawford, note 32, p. 15. Crawford indicates a number of constitutional characteristics met by the Charter, such as virtual universality, broad scope of activities and success in certain fields, and lack of any rival organization. He, however, also points out the weaknesses of the United Nations, such as the lack of a clear distribution of powers and, most dangerous of all, lack of institutional means for protecting the State from unlawful or unjust acts of UN organs.

91. Paolo Picone, *Nazioni Unite e obblighi 'erga omnes'*, in 48 *COMUNITÀ INTERNAZIONALE* 717 (1993).

92. Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter Revisited*, in 1 *MAX PLANCK YEARBOOK OF UNITED NATIONS LAW* 31 (1997).

93. *Ibid.*, p. 33.

94. MOSLER, note 1, p. 5.

95. Christian Tomuschat, in Tomuschat (ed.), note 4, p. ix.

96. C. WILFRID JENKS, *THE PROPER LAW OF INTERNATIONAL ORGANIZATIONS* (London: Stevens, 1962), p. 257, citing PHILLIMORE'S COMMENTARIES, vol. 2, 1879.

97. Christian Joerges, note 1.

98. On the whole subject see the remarkable study by PHILIP ALLOT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* (Oxford: Oxford University Press, 1990), and my review of this book in 70 *CANADIAN BAR REVIEW* 822 (1991). A modified version of this paper will appear, with acknowledgements, in a forthcoming issue of the *Australian Yearbook of International Law*.