

“Subsequent practice in relation to constituent treaties of international organizations”
In the middle between “positivism” and “realism”

The interpretation of constituent treaties of international organizations over time calls into question the practice of international organizations under the meaning of article 31 (3) (b) of the Vienna Convention on the Law of Treaties to consider whether the practice of international organizations, through their organs, is representative of subsequent practice and more extensively what acts of the organs are included.

After a constituent treaty of an international organization enters into force, the parties to that treaty may be regarded as interpreting the treaty through their practice, in which case that practice is relevant when considering how a treaty should best be interpreted.

The International Law Commission recently embarked on a detailed study of the use of subsequent agreements and subsequent practice, which resulted in a series of guidelines and commentary. The sixty-seventh session of the ILC focused on “subsequent practice in relation to constituent treaties of international organizations. Therefore, the purpose of this article is to support the ILC in its work by considering whether the practice of international organizations through the decisions and the acts of their organs may constitute “subsequent practice” within the meaning of article 31, (3) (b) of the VCLT.

This paper argues that the practice of the United Nations, the most renowned international organization worldwide, through its organs is encompassed in article 31, (3) (b) provided certain specific circumstances are met in light of the acts and decisions that its organs approve. Section (b) of article 31, (3) of the VCLT refers to “any subsequent practice in the application of the constituent treaty, without specifying that the practice of the parties must establish their agreement.

Constituent treaties of international organizations, such as the United Nations, can change over time, making necessary to adapt the provisions to new situations, following an evolutionary approach in lights of the needs of the international legal community and in compliance with the requirements of stability and the change in the law of treaties. Therefore, establishing the meaning that the states parties originally gave to a provision of the constituent treaty is important to operate a sort of “renvoi” to “the state of the law” at the time of the application of the constituent treaty. The aim of this paper is to establish whether the provisions of the United Nations charter must be interpreted in its original meaning or whether the bodies of the United Nations are entitled to give an “evolutive interpretation” to those provisions.

Subsequent practice of the bodies of the United Nations is a tool to interpret the provisions of the United Nations Charter to demonstrate the agreement of the parties as to the meaning of the terms in question and ultimately allow a certain degree of dynamism in the interpretation and application of the constituent treaty in compliance with the meaning that the parties gave at the time the UN Charter was enforced.

This article wants to establish whether an evolutionary interpretation of the provisions of the UN Charter is plausible and to what extent the states parties may interpret the terms extensively.

To establish a solid border between interpretation and transformation of the constituent treaty, the interpreter is required to prove consistency with the ordinary meaning of the terms, application of the provisions in good faith and respect of the object and purpose of the provisions.

Informal amendments to the provisions of the constituent treaty may occur through the intervention of its judicial organ, the International Court of Justice, interpreting the constituent instrument of the organization following the structure of the organization. The practice of the ICJ has shown to be more empowering than limiting in interpreting the UN Charter. Thus, it may be considered how a change in the constitutional setting may result in a transformation of the structure and autonomy of the organization, within the limits fixed by the parties in the treaty provision.

Up until now none of the advisory opinions or judgments rendered by the ICJ has clearly admitted or hypothesize the possibility that a subsequent practice may result in a modification of the United Nations Charter.

The practice of the UN organs reflects the complexity and the scope of actions of one of the most relevant international organizations worldwide. Its evolution is representative of the growing evolution that the international community has faced especially in the last decade. The jurisprudence of the ICJ has proved to be one of the most advanced and at the same time respectful of the roots and the principles firmly stated in the UN Charter. Therefore, the outcome that comes from this in-depth research is that the practice of the UN organs may constitute subsequent practice only when and if the practice of the Member States is carefully assessed through the conduct of the United Nations organs through the variety of acts that its bodies are entitled to issue.

Only a balance between a positivistic approach (given by the set of norms contained in the UN Charter) and the “realism” of the ICJ may lead to the conclusion that subsequent practice in relation to constituent treaties of international organizations” may be validly assessed.