

Thomas Grant. ***Admission to the United Nations, Charter Article 4 and the Rise of Universal Organization.***

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'Every constitution encounters the difficult problem of distinguishing interpretation and adaptation, progressive development and amendment'.<sup>1</sup> The question whether, and to what extent, the practice of an organization does not merely interpret but also modify its constitutive instrument lies at the very heart of Thomas Grant's volume on Article 4 of the United Nations Charter. The volume, divided into seven chapters, is based on a thorough account of the United Nations' practice from 1945 onwards in the matter of admission, from the 'early years' (Chapter 2) to the present day controversies over Kosovo and Taiwan (Chapters 5 and 6). Grant highlights perfectly the shift in 1955–1956 from a rigorous process over admission to the presumed right of states to membership; that is to say, from the wartime alliance to the universal organization (Chapter 3). This, in turn, raises the question of the legal justification for this change, a key issue addressed in Chapter 4 which this book review will concentrate on. The legal framework applicable to admission is examined in the first and last chapters. Chapter 1 intends to give an overview of the provisions of the Charter governing admission, though it deals exclusively with the procedural mechanism set out in Article 4(2).<sup>2</sup> As for Chapter 7, it examines the legal consequences for a state of being admitted to the United Nations.

The underlying question of Grant's book is whether the practice of the Organization subjected Article 4 of the Charter to development through interpretation or, instead, put that provision through a process of amendment (at 127). Grant starts with the following assumption: Article 4 bears an original meaning. According to the early interpretations of Article 4 by the International Court of Justice<sup>3</sup> and the *travaux préparatoires* of the Charter, the United Nations is to control admission by limiting it to applicants which fulfil certain specified criteria, and it has to determine, by reaching a judgement, whether an applicant has fulfilled those criteria (at 133). Indeed, Article 4(1) specifies that membership 'is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations'. Hence, Grant contends that the package deal of 1955–1956 and its associated practice are *contra legem*, for they are contrary to Article 4 as originally adopted. The package deal, addressed in Chapter 3, refers to a process by which the Security Council recommended 16 states for admission as a whole, avoiding an exact application of the substantive criteria of Article 4(1). Having distinguished between interpretation and amendment in terms of consistency with the initial position under the constitutive instrument, Grant concludes that Article 4 was amended by way of practice.

Through the prism of Article 4 of the Charter, Grant's book has the merit of dealing with general international law issues such as the interpretation and amendment of constitutive instruments of international organizations, and statehood, as the residual criterion for admission to the United Nations. A large part of Chapter 4 aims thus to contribute to

<sup>1</sup> B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (1998), at 137.

<sup>2</sup> Art. 4(2) refers to the shared competence of the General Assembly and the Security Council over admission: 'the admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council'.

<sup>3</sup> *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory opinion of 28 May 1948 [1948] ICJ Rep 62; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory opinion of 3 Mar. 1950 [1950] ICJ Rep 7.

an understanding of the amendment of constitutive instruments through practice. Grant makes two arguments in this respect. First, he demonstrates that general rules of international law ascertain, notably through Article 39 of the 1969 Vienna Convention on the Law of Treaties,<sup>4</sup> that the course of conduct of the parties to a treaty may effect amendment of the treaty (at 117). Secondly, he considers that, even though the Charter of the United Nations contains its own amendment provisions (Articles 108 and 109), a constitutive instrument is still susceptible to amendment by way of practice (at 123).

Despite Grant's remarkable mastery of dealing comprehensively with scholarly literature on this issue, one aspect of the question seems to have been eclipsed: constitutional interpretation and constitutional amendment. Grant refers several times to the constitutional character of the Charter, however, without clarifying what he implies by this expression. He considers the matter of admission as 'a question involving the distinctive constitutional aspects of the treaty which created the organization' (at 121). On this point, Grant has only touched the surface of the water, creating ripples rather than a swirl. The present reviewer regrets that Grant did not include in his discussion current and past scholarly works on the constitutional interpretation and amendment of the Charter. On the one hand, this would have put into perspective the search for an original meaning of Article 4: 'an interpretation based on the original will of the parties is inappropriate'.<sup>5</sup> Indeed, the proponents of a constitutionalist approach give more weight to the specific purpose of the Charter. On the other hand, Grant's conclusion – that the Charter may be substantially modified by way of practice despite Articles 108 and 109 providing for formal amendment – would also have been more controversial. For instance, Fassbender claims that the Charter can be

amended only by way of the procedures provided for by Articles 108 and 109, for the Charter requires the participation of the international legal community at large for it to be amended.<sup>6</sup> The scope of consent is used by Kolb for distinguishing between the changing (or creating) and the interpreting effect of practice: the more subsequent practice is consistent and induces mutual consent, the more it will be considered as modifying the treaty.<sup>7</sup> This is, in fact, very similar to Grant's conclusion of Chapter 4: '[t]he scope of dissent and its duration will calibrate the effect the practice in question exerts upon the constitutional system' (at 143). A closer examination of the distinctive constitutional aspect would have clarified this point.

Grant's volume nevertheless remains a valuable account of the practice of the United Nations relating to Article 4 of the Charter. Controversies and arguments of member states over admission are analysed by the author with great insight. Grant pursues the noble cause of the researcher, livening up old controversies in order better to understand new ones, never considering the present as an achieved fact. The United Nations was not conceived as universal. Beyond the legal justification of the shift towards universality, the question remains why the United Nations ought to be universal. This amounts to asking whether the maintenance of international peace and security is imaginable without the participation of all concerned.

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<sup>4</sup> Art. 39 states that '[a] treaty may be amended by agreement between the parties'.

<sup>5</sup> Fassbender, *supra* note 1, at 132.

<sup>6</sup> *Ibid.*, at 140.

<sup>7</sup> R. Kolb, *Interprétation et création du droit international, Esquisses d'une herméneutique juridique moderne pour le droit international public* (2006), at 488.