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Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?

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Abstract

The present Article considers and compares the subsequent practice of the parties according to Art. 31 (3) (b) VCLT and established practice amounting to rules of an international organization (Art. 5 VCLT). The significance of these concepts lies in their potential to contribute to the adaptation of constituent instruments of international organizations to changing factual and normative circumstances. Established practice can serve as a hinge between the general law of treaties and the law of international organizations. The paper argues that both concepts are not two sides of the same coin, but that they have to be distinguished. Whereas subsequent practice primarily serves in interpretation, established practice amounting to a rule of the organization is quasi-customary law specific to the respective organization. It can even influence the preconditions for and significance of subsequent practice in the application of constituent instruments. Thus, the requirements for the agreement of the parties in accordance with Art. 31 (3) (b) VCLT can be relaxed and tacit consent can be recognized more easily. In some cases even organ practice which is independent from (all) Member States can create subsequent practice. However, these informal mechanisms of change raise problems of legitimacy.

A. Introduction

Practice has always played a vital role in the development of international law. As an essential condition for the formation of customary law, it has received particular attention in international legal scholarship. However, some aspects of practice may not have been sufficiently examined so far. *Subsequent practice* has the potential to contribute to the evolution of treaties over time and to their adaptation to changing factual circumstances, in short, to contribute both to the stabilization and to the further development of international law.[1] It has been codified as a method of

[1] This topic has recently been taken up by the International Law Commission, Treaties over Time – in particular: Subsequent Agreement and Practice, Annex A to the ILC Report 2008 (60th session), http://untreaty.un.org/ilc/reports/2008/english/annexA.pdf (last visited 16 August 2011).

interpretation in Art. 31 (3) (b) of the Vienna Convention on the Law of Treaties[2] (VCLT) and reflects customary law.[3]

> Article 31 – General rule of interpretation
> "3. There shall be taken into account, together with the context:
> […]
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

Subsequent practice means consistent, treaty-related actions and omissions of the parties to or organs established by the treaty on international level, which reflect the common ideas of all the parties about the interpretation of the treaty.[4] It is vital for the understanding of the following considerations to keep in mind that Art. 31 (3) (b) VCLT demands the agreement of *all the parties* in order to make practice relevant for treaty interpretation.[5]

The adaptation of treaties to changing circumstances is an especially important function with regard to the constituent instruments of international organizations. The international community entrusts international organizations with a growing number of vital tasks, such as protecting the environment, safeguarding economic stability, keeping peace

2 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 [VCLT].

3 The predominant view is that Art. 31 VCLT reflects customary law: e.g. M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), Art. 31, paras 37-38; W. v. Vitzthum, *Völkerrecht*, 5th ed. (2010), para. 123; the ICJ shares this opinion: see e.g. *Case concerning Legality of Use of Force (Serbia and Montenegro v. Belgium)* Preliminary Objections, Judgment, ICJ Reports 2004, 279, 318, para. 100; *LaGrand Case (Germany v. United States of America)*, Judgment, ICJ Reports 2001, 466, 501, para. 99; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66, 75, para. 19 [Use by a State of Nuclear Weapons].

4 Result of a further development of the definitions of W. Karl, *Vertrag und spätere Praxis im Völkerrecht* (1983), 112-120 [Karl, 1983] and U. Linderfalk, *On the Interpretation of Treaties – The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), 165-171.

5 G. McGinley, 'Practice as a Guide to Treaty Interpretation', 9 *Fletcher Forum of World Affairs* (1985) 1, 211, 217; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008), 356-357; Villiger, *supra* note 3, Art. 31, para. 22.

and security and many more. Those tasks are subject to constant changes, which cannot all be "absorbed" by formal amendment or revision procedures for the affected constituent instruments. Therefore, considering the practice of an organization when interpreting its constituent instrument is a way to mitigate some – although of course not all – tensions between those instruments and the current circumstances. Nevertheless, it is important to remember that formal amendment procedures are guarantors of legitimacy and that the necessary legitimacy of informal change must be provided in a different way.

Taking these reasons into consideration, in the case of international organizations, one soon comes across another concept of practice: the so-called *established practice.* It can lead to the formation of so-called *rules of the organization*. References to the rules can be found in Art. 5 VCLT and numerous other instruments.[6] Rules of the organization mean, for example, according to the definition in Art. 2 (1) (j) Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLT-IO)[7]:

"[…] in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization".

The most recent Draft Articles on Responsibility of International Organizations contain a similar definition.[8] The rules of the organization play a significant role in this document. For example, according to Art. 9, the breach of an international obligation by an international organization "may arise under the rules of the organization". The rules are also highly

6 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, UN Doc.A/CONF.129/15 [VCLT-IO]; Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 14 March 1975, UN Doc. A/CONF.67/16; Draft Articles on Responsibility of International Organizations (adopted by the ILC on first reading), ILC Report on the work of its sixty-first session, available at http://untreaty.un.org/ilc/reports/2009/english/chp4.pdf (last visited 2 August 2011), 19.

7 VCLT-IO, *supra* note 6.

8 Art. 2 (b) of the Draft Articles on Responsibility of International Organizations, *supra* note 6; see also Art. 1 (34) Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, *supra* note 6.

relevant, *inter alia*, for the attribution of conduct[9] and the applicability of the Draft Articles.[10] This illustrates the importance of this concept in most areas of international law in which international organizations play a role.

Interestingly enough, the VCLT, which is indisputably the most important of the cited documents, lacks a definition of the rules. Yet most authors agree that established practice is also part of the relevant rules in Art. 5 VCLT.[11] Art. 5 VCLT reads:

Article 5 VCLT – Treaties constituting international organizations and treaties adopted within an international organization

"The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization *without prejudice to any relevant rules of the organization*."[12]

This provision reflects the notion that constituent instruments of international organizations are different from other bilateral and multilateral treaties, as can be seen from the dense institutional structure in the form of organs, which sometimes develop a life of their own.[13] All provisions of the

9 Art. 5 (2) of the Draft Articles on Responsibility of International Organizations, *supra* note 6.

10 *Id.*, Art. 63; for recent comments of international organizations on the scope of the rules of the organizations cf. Responsibility of international organizations – Comments and observations received from international organizations, UN Doc. A/CN.4/637 (2011), e.g. Comments of the European Commission, 24-25 and UN Doc. A/CN.4/637/Add.1 (2011), Comments of the United Nations, 6-7, 17, 30. These comments discuss the extent to which the rules of the organization are rules of international law or of the organization's internal law. This issue is above all relevant for the scope of the responsibility of international organizations and will not be further discussed here.

11 W. Karl, 'Die spätere Praxis im Rahmen eines dynamischen Vertragsbegriffs', in R. Bieber & G. Ress (eds), *Die Dynamik des europäischen Gemeinschaftsrechts* (1987), 81, 90-91 [Karl, 1987]; A. Verdross & B. Simma, *Universelles Völkerrecht*, 3rd ed. 1984, 434-435; Villiger, *supra* note 3, Art. 5, para. 8.

12 Italics added.

13 The own life of international organizations is a notion which can be found frequently: Separate Opinion of Judge Lauterpacht, *Voting Procedure in Questions Relating to Reports and Petitions Concerning the Territory of South West Africa*, Advisory Opinion, ICJ Reports 1955, 67, 90, 106; e.g. taken up by B. Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia*

VCLT are, when applied to the constituent instruments of international organizations, subject to Art. 5 VCLT and the rules of the organization. On condition that established practice really amounts to such a rule, it can influence the application of the VCLT to the constituent instruments and thus the entire relationship between the law of treaties and the law of international organizations.

This explains why the concepts subsequent and established practice matter as such. A recent written statement on the Draft Articles on Responsibility of International Organizations delivered in the Sixth Committee of the UN General Assembly illustrates why the interrelation between subsequent practice and established practice raises particular problems as well. *Sir Daniel Bethlehem QC*, Legal Adviser of the Foreign and Commonwealth Office of the United Kingdom, made the following comments on Art. 2 (b) of the Draft Articles on Responsibility of International Organizations, which contains one of the aforementioned definitions of the rules of the organization:

"[…] further explanation about what constitutes 'established practice' and when such 'established practice' of an international organisation amounts to a 'rule' would be helpful. We understand the Special Rapporteur considers the term 'vague' but 'indispensable'. We share that concern and wonder whether 'established practice' is best considered a means for interpreting the rules of an international organisation, rather than constituting a rule in itself. Further elaboration by the Commission would assist".[14]

Journal of Transnational Law (1998) 3, 529, 540; G. Fitzmaurice, 'Hersch Lauterpacht – The Scholar as Judge. Part III', 39 *British Yearbook of International Law* (1963), 133, 166. However, this concept can only serve to vivify and illustrate the role of organs and must not be taken literally, as the States always preserve a considerable if not decisive influence on this "life".

14 Written Statement of the United Kingdom on the ILC Report 2009, 16th meeting of the Sixth Committee of the General Assembly in its 64th session, 27 October 2009, 4-5, on file with the author; there are other authors who use the term established practice when discussing the relevance of practice for the interpretation of constituent instruments: S. Engel, '"Living" International Constitutions and the World Court (The Subsequent Practice of International Organs under Their Constituent Instruments)', 16 *International and Comparative Law Quarterly* (1967) 4, 865, 894; S. Rosenne, *Developments in the Law of Treaties 1945-1986* (1989), 241; H. Schermers & N. Blokker, *International Institutional Law*, 4th ed. (2003), para. 1347.

This comment suggests that established practice and subsequent practice have the same function, namely, interpretation. Thus, they would be nothing but two sides of the same coin: heads, subsequent practice of the member states and organs, and tails, established practice of the organization, both of which are relevant for the interpretation of constituent instruments.

Such an assumption contradicts the understanding of established practice as expressed in the above-mentioned conventions. In this understanding, established practice amounts to *rules* of the organization. Rules do not interpret, they are interpreted. Pursuant to Art. 5 VCLT, the rules of the organization could modify or even precede the general rules expressed in the provisions of the VCLT. Art. 31 (3) (b) VCLT is one of these provisions. Thus, established practice could change the way to consider subsequent practice when it comes to the interpretation of constituent instruments, but it would not be a substantive basis for their interpretation. The purpose of the present article will be to examine the interrelation between both kinds of practice and to offer a solution for the problems just described.

A specific example may illustrate why this is worth the effort: the *Wall* Advisory Opinion[15] of the International Court of Justice, read in context with a prior opinion, *Use of Nuclear Weapons.*[16]Having been confronted with the question whether under Arts 96 (1) and 12 (1) of the UN Charter the General Assembly could ask for an Advisory Opinion of the ICJ while the Security Council was seized on the same matter, the Court almost exclusively referred to the practice of both organs in application of Art. 12 of the UN Charter to answer it to the positive. It did so without discussing whether the respective General Assembly resolutions were unanimous or majority decisions and whether those of the Security Council were expressly or impliedly supported by the Member States.[17] If this consideration of organ practice in an international organization rested on Art. 31 (3) (b) VCLT alone,[18] as the earlier *Use of Nuclear Weapons* Opinion could suggest,[19] the consent of all parties to the UN Charter to such an interpretation would seem to have been necessary, for this provision is

15 *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 [Wall Opinion].
16 Use by a State of Nuclear Weapons, *supra* note 3.
17 Wall Opinion, *supra* note 15, 148-150, paras 24-29.
18 More exactly: the according rule of customary law.
19 Use by a State of Nuclear Weapons, *supra* note 3, 75, para. 19.

seen to require the agreement of *all* the parties.[20] The ICJ should have looked for unanimous decisions, borne by the States, and it should have said so. If not, and if the reference to Art. 31 (3) (b) VCLT was still correct, then something must have influenced this provision. This could be the rule of customary law as codified in Art. 5 VCLT. Further, the established practice of the United Nations could have created a rule of the organization with the content that its subsequent practice does not strictly require the agreement of *all* the Member States.

The analysis of this issue will take the following course: after a very short overview of the drafting history of Art. 5 VCLT (B.), it will be determined whether established practice also belongs to the rules of the organization as far as the VCLT is concerned (C.). The next step will be to specify the content and nature of established practice and the conditions on which it can amount to a rule of the organization. This operation cannot be performed without connecting and comparing it with subsequent practice in order to see whether both concepts are identical or whether they differ substantively (D.).

Additionally, if subsequent practice and established practice are really different concepts, the original and most important question of their interplay will be posed. We will briefly revisit the introductory case and see whether one concept of practice can really influence the other (E.).

B. Drafting History of Art. 5 VCLT

Art. 5 VCLT garnered considerable attention during the course of the debate of the ILC and the Vienna Conference.[21] The ILC drafted and changed various provisions which were the predecessors of Art. 5.[22] In Vienna a considerable number of delegates, both of States and of international organizations, took the floor in order to comment on the respective versions of the Article.[23] Sir Francis Vallat, the chairman of the

20 See *supra* note 5.

21 Cf. Villiger, *supra* note 3, Art. 5, para 2.

22 Rosenne, *supra* note 14, 201-211.

23 An elaborate description of the various suggestions and reactions has been made by J. González Campos, 'La aplicación del future convenio sobre derecho de los tratados a los acuerdos vinculados con Organizaciones Internacionales (Articulo 4 del proyecto de la C.D.I. de 1966)', in *Estudios de Derecho Internacional, Homenaje a D. Antionio de Luna (1968)*, 212, 228. For a shorter overview see Villiger, *supra* note 3, Art. 5, para. 2.

UK delegation, even "said that in substance Art. 4 [by now Art. 5][24] was one of the most important before the Committee".[25] The most important change of this Article happened at Vienna when "[…] the application of the present Articles […] *shall be subject to*[26] any relevant rules of the organization" was replaced with today's "[…] *without prejudice to*[27] any relevant rules of the organization". Though some authors are of the opinion that it did not make a substantial difference,[28] this change of wording will play an important role in the following considerations. The eventful drafting history lies at the origin of two extensive contemporary analyses.[29] The fact that it had been the subject of so much attention and debate would seem to suggest that jurisprudence would be full of references to Art. 5 of the VCLT, but this is not the case. There are no judgments or advisory opinions of the ICJ, nor any arbitral awards which expressly quote Art. 5.[30]

The drafting history evokes the impression that the ILC, the States and organizations represented in Vienna and many international legal scholars considered Art. 5, the rules of the organization, the established practice and

24 Comment of the author.

25 United Nations Conference on the Law of Treaties, Official Records, 1st Session 1968, UN Doc. A/CONF.39/11 (1968), 44, para. 31.

26 Italics added.

27 Italics added.

28 Villiger, *supra* note 3, Art. 31, para. 7.

29 González Campos, *supra* note 23, 218-226; Rosenne, *supra* note 14, 252-255; Rosenne's work can be considered contemporary since he mainly transferred the essay 'Is the Constitution of an International Organization an International Treaty?', 12 *Comununicazioni e Studi* (1966), 21 to his monograph previously cited, which will be consulted as the more recent work.

30 Even though there are several cases in which the basic thought of this provision might have been applied. Many of them were issued before the draft of today's Art. 5 VCLT, but appear to consider the relationship between the law of treaties and the constituent instruments of international organizations in a similar way: Cf. Wall Opinion, *supra* note 15, 149-150, paras 27-28; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, 22 [Namibia]; *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion, ICJ Reports 1962, 151, 157 [Certain Expenses]; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, 4, 8-9 [Competence of Admission]; *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, 182; in Use by a State of Nuclear Weapons, *supra* note 3, 74, para 19, the Court even mentioned the "relevant rules of the organization".

their influence on the general law of treaties vital issues, highly relevant for international legal practice and worth to be discussed intensely. The role Art. 5 has played in practice evokes the impression that they all were mistaken. These curious impressions are further reasons for the analysis undertaken here.

C. Is Established Practice Part of the Rules of the Organization in Art. 5 VCLT?

Thus, it is time to turn to the question of whether the established practice of the organization can amount to rules of the organization. The language of Art. 5 can serve as a starting point. The term "rules" does not give any hint at whether only provisions of the constituent instruments are comprised or the established practice of the organization as well. *Rules* only imply that the concept shall be mandatory, that is, legally binding.[31] The word "any" is the only indication of the meaning of the reservation element contained in Art. 5 "[…] *any* relevant rules of the organization" must refer to more than only the constituent instruments;[32] otherwise, it would have been much more straightforward to omit the "any" and replace "rules of the organization" with "rules of the constituent instrument of the organization".

An examination of the preparatory works leads to results that are in line with this interpretation. There, the rules of the organization are not only referred to as the provisions of the constituent instruments, but also as the (unwritten) customary rules developed in practice,[33] as stated by the Chairman of the Drafting Committee, *Yasseen.*[34] However, the Commentary to the ILC Draft of 1966 does not give a definition of the rules of the organization and does not refer to the issue of practice.

31 Cf. United Nations Conference of the Law of Treaties, Official Records, 1st session (1968), *supra* note 25, 147, paras 9-10 (Yasseen).

32 R. Bernhardt, 'Interpretation and Implied (Tacit) Modification of Treaties. Comments on Arts 27, 28, 29 and 38 of the ILC's 1966 Draft Articles on the Law of Treaties', 27 *Heidelberg Journal of International Law* (1967), 491, 494.

33 Yearbook of the International Law Commission (1963), Vol. II, 213, Commentary to Draft Art.48 on the Law of Treaties, para. 2; United Nations Conference on the Law of Treaties, Official Records, 2nd session (1969), UN Doc. A/CONF.39/11/Add.1, 4 para. 22.

34 United Nations Conference of the Law of Treaties, Official Records, 1st session (1968), *supra* note 25, 147, para. 15.

As the VCLT does not contain a definition of the rules of the organization, the relevant literature has to make recourse to the other conventions and draft articles which contain *and* expressly define the rules. In Art.2 (1) (j) VCLT-IO the rules of the organization – a term which is used, inter alia, in the almost identical Art.5 VCLT-IO – are defined as

"[…] in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and *established practice* of the organization".

The definition in Art. 1 (1) (34) of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 1975 is similar. It only lacks the hierarchy established between the elements of the definition in Art. 2 (1) (j) VCLT-IO ("in accordance with them"). The most recent example is Art. 2 (b) of the ILC Draft Articles on Responsibility of International Organizations[35] which is also almost identical to Art. 2 (1) (j) VCLT-IO.[36]

Whatever other slight differences in wording may be, all three definitions of the rules of the organization include established practice. Thus it is not surprising that most authors apply Art. 2 (1) (j) VCLT- IO – as this convention is most comparable to the VCLT – also to Art. 5 VCLT and include established practice.[37] Yet it does not go without saying that the VCLT-IO can in principle be used to interpret Art. 5 VCLT in context.

Since the rules of interpretation are applicable to the Convention itself,[38] Art. 31 VCLT also determines the contextual interpretation of Art. 5

35 Draft Articles on Responsibility of International Organizations, *supra* note 6, 43.

36 VCLT-IO, *supra* note 6. The ILC refers in its Commentary to Art. 2 Draft Articles on Responsibility of International Organisations to "a few minor stylistic changes": *supra* note 6, 49, para. 15. The only evident difference is the inclusion of "other acts of the organization" into the definition of the rules of the organization. This does not really mean a difference in scope and content, given the words "in particular" in all definitions. They make already clear that the enumeration of the constituent instruments, the decisions, resolutions and the established practice is not supposed to be complete. Thus the advantages of this extension are uncertain, all the more since "other acts of the organization" can also be considered part of its practice.

37 See *supra* note 11.

38 Karl, 1983, *supra* note 4, 358-362; Villiger, *supra* note 3, Art. 31, para. 35, Issues of Customary International Law, para. 27; cf. also Art. 24 (4) VCLT, *supra* note 2. Yet the self-applicability is not undisputed: K. Marek, 'Thoughts on Codification', 31 *Heidelberg Journal of International Law* (1971), 489, 510.

VCLT. More specifically, paragraph 1 ("in their context") and paragraph (3) (c) are of assistance. According to sub-paragraph (c) "any relevant rules of international law applicable in the relations between the parties" shall be considered for the purpose of interpretation. The VCLT-IO, however, has not entered into force, as its Art. 85 (1) requires 35 ratifications by State parties, which have not been achieved.[39] Thus, the Convention as such has not reached the status of a *binding* rule of international law[40] which is a precondition for the application of Art. 31 (3) (c) VCLT.[41] Finally Art. 31 (1) VCLT, which refers to an interpretation of the terms of a treaty *in their context*, only applies to the context of the terms within the same treaty[42] and does not include other treaties. In this regard paragraph (3) sub-paragraph (c) is *lex specialis*. Therefore, Art. 2 (1) (j) VCLT-IO cannot *directly* be considered in a contextual interpretation of Art. 5 VCLT.

Nevertheless, the object and purpose of Art. 5 VCLT speak in favor of an inclusion of established practice into the term "rules of the organization." Object and purpose of the provision are on the one hand, to provide for a comprehensive application of the Vienna Convention to the constituent instruments of international organizations – and, on the other hand, not to disregard the characteristics of these instruments and the needs of the organizations established by them.[43]

This purpose cannot be served without considering established practice: in many cases the constituent instruments of international organizations do not contain the necessary regulations for the proper functioning of the organization, whereas the provisions of the Vienna Convention, if applied without modification, are not consistent with the special qualities and needs of the organizations due to their autonomous features. Thus, it is inevitable to resort, *inter alia*, to the practice of the organization in order to compensate for the shortcomings of both regimes.

The best example is the interpretation of the constituent instruments. Normally, they do not themselves provide for their interpretation and, as a result, recourse to the Vienna Rules (Arts 31 *et seqq.* VCLT) has to be

39 UNTC Chapter XXIII N 3, available at http://treaties.un.org (last visited 4 August 2011), only 29 states and 12 International Organizations.

40 Cf. T. Stein & C. von Buttlar, *Völkerrecht*, 12th ed. (2009), para. 36.

41 Villiger, *supra* note 3, Art. 31, para. 25.

42 Cf. *id*., Art. 31, para. 10.

43 Cf. Spanish Delegation, United Nations Conference of the Law of Treaties, Official Records, 1st session 1968, *supra* note 25, 44, paras 23-30.

made.[44] This is the case despite the prevailing view in the relevant literature and jurisprudence that the constituent instruments have to be interpreted differently from bilateral und regular multilateral treaties.[45] The most prominent example of such difficulties is the United Nations.

All things considered, the language, history and purpose of Art. 5 VCLT lead to the conclusion that established practice is part of the rules of the organization regardless of the difficulties of contextual interpretation.

D. What is Established Practice and how can it be Distinguished from Subsequent Practice?

Established practice is neither defined in any of the mentioned ILC Conventions/draft articles nor in the commentaries. The ILC commentary to the VCLT-IO specifies the conditions for practice to be *established*, but it does not specify its legal nature and what the practice itself can consist of.[46] The latter may be due to the fact that every international lawyer can imagine what such practice of international organizations is. First of all, he or she would think of resolutions and decisions of organs, then he or she might draw the parallel to State practice as a factor in the formation of customary law. This would mean to include all the acts of States discussed in that context, such as declarations, waivers, notifications, protests, statements

44 Exceptions are the provisions in the constituent instruments of some UN specialized agencies providing for an authoritative interpretation by a determined organ, e.g. Art. 84 Convention on International Civil Aviation (ICAO), 7 December 1944, 15 U.N.T.S. 295; Art. IX Articles of Agreement of the International Bank on Reconstruction and Development, 27 December 1944, 2 U.N.T.S. 134; Art. XXIX Articles of Agreement of the International Monetary Fund, 22 July 1944, 2 U.N.T.S. 39; Art. IX, para. 2 of the Agreement Establishing the World Trade Organization, 15 April 1994, 1867 U.N.T.S. 154.

45 J. Alvarez, 'Constitutional interpretation in international organizations', in J.-M. Coicaud & V. Heiskanen (eds), *The legitimacy of international organizations* (2001), 104, 136-137; C. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd ed. (2005), 59; E. Lauterpacht, 'The Development of the Law of International Organization by the Decision of International Tribunals', 152 *Recueil des Cours* (1976) 4, 377, 416; M. Ruffert & C. Walter, *Institutionalisiertes Völkerrecht* (2009), paras 136-138; Use by a State of Nuclear Weapons, *supra* note 3; Cf. Certain Expenses, *supra* note 30, 157; Cf. Competence of Admission, *supra* note 30, 8-9.

46 Yearbook of the International Law Commission (1982), Vol. II (Part 2), 21, para. 25.

before international bodies, domestic acts, etc.,[47] as long as they refer to the organization in question and are representative for the whole membership. If State practice comprises such informal acts, this must also apply to organ practice, for there is no reason to limit the relevant action of organs to formal acts such as resolutions. Nevertheless, formal acts are the most important sources of established practice, as they expressly refer to the constituent instruments, as they are easily accessible for interpreters and as they are saved and documented, so that access is possible at all.

This raises the question of the relationship between established practice, on the one hand, and the "decisions and resolutions adopted in accordance with them [the constituent instruments][48]" referred to in the various definitions of the rules of the organization, on the other hand. The different categories of rules of the organization should not be considered equal in rank. On the contrary, there are good reasons to assume a hierarchy between them,[49] as the reservation "in accordance with them" shows. It is worth pointing out that this phrase does not grammatically refer to established practice, but only to the decisions and resolutions.[50] Thus, it is possible that numerous decisions and resolutions with a similar content cumulatively lead to the creation of an established practice, without prejudice to their – lesser significance as isolated acts. In any case it would be implausible to assume that a single decision or resolution can have the same influence on the application of the VCLT to the constituent instrument as an established practice with the combined effect of numerous consistent acts.

As regards the legal nature of established practice amounting to rules of the organization, it shows strong parallels to customary law. It should be

47 K. Zemanek, 'What is "State Practice" and who Makes It?', in U. Beyerlin *et al.* (eds), *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht, Festschrift für Rudolf Bernhardt* (1995), 289, 293-299.

48 Explanation of the author.

49 ILC Report on the work of its sixty-first session, *supra* note 6, 50; Responsibility of international organizations – Comments and observations received from international organizations, UN Doc. A/CN.4/637 (2011), 18, note 12 (joint submission of several international organizations).

50 G. Gaja, 'A New Vienna Convention on Treaties between States and International Organizations or between International Organizations: A Critical Commentary', 58 *British Yearbook of International Law* (1987), 253, 262.

considered a kind of customary law of the organization,[51] formed by the organization and applying only to the organization. Yet it is not entirely that simple because at the same time established practice has a characteristic which is due to its origins in the organization: it is based to a large extent on secondary law of the organization, on the binding resolutions and decisions of its organs.[52] This does not mean, however, that *opinio iuris* is dispensable for the formation of such a rule.

To the contrary, *opinio iuris,* or better, a surrogate/subjective element corresponding to the characteristics of an international organization, is necessary. In the case of binding secondary law, it will be very easy to detect an *opinio iuris* behind it, but there are other cases which are not so clear. Even though Art. 5 VCLT refers to *rules* of the organization, i.e. binding norms, it is also possible that principles repeatedly adopted in unanimous non-binding resolutions of a plenary organ eventually become a binding rule, if they are supported by a strong intention to make them binding. However, this will be rare and consequently difficult to prove and can be assumed only in exceptional circumstances. In any case, the *opinio* behind established practice forming a rule of the organizations must be backed up by the organs and the Member States represented in them.

There is reason to believe that the concept of established practice is not limited in its scope to the ILC conventions and draft articles containing it. In other words, the inclusion of established practice in all these instruments drafted by experts of international law and ratified by a high number of States and international organizations admits the conclusion that established practice is a more comprehensive concept within the law of international organizations. It not only influences the meta-rules on the conclusion, interpretation and termination of the constituent instruments but also as quasi-customary law of the organization, it has the potential to at

[51] For the concept of customary law of the organization cf. already Yearbook of the International Law Commission (1963), Vol. II, 213, Commentary to Draft Art. 48 on the Law of Treaties, para. 2; Official Records of the UN Convention on the Law of Treaties, 1st session (1968), *supra* note 25, 147, para. 15; 2nd session (1969), *supra* note 33, 4, para. 22. Cf. also Lauterpacht, *supra* note 45, 464; R. Higgins, 'The Development of International Law by the Political Organs of the United Nations', 59 *American Society of International Law Proceedings* (1965), 116, 121; Pollux, 'The Interpretation of the Charter', 23 *British Yearbook of International Law* (1946), 54.

[52] Cf. Art. 2 (1) (j) VCLT-IO, *supra* note 2.

least add substantive rules to the law of the organization, which have not been included into the constituent instruments.[53]

Additionally, it can even be a mechanism for the informal modification of existing provisions, beyond the limits of interpretation, which subsequent practice – at least in terms of Art. 31 (3) (b) VCLT – has to respect. After all, it is often acknowledged that later customary law binding for the parties to a treaty can in principle modify the treaty.[54] The same would be true for the quasi-customary law of established practice and the constituent instruments. Thus, established practice can not only be a link between the general law of treaties and the law of international organizations, but another mechanism, which can adapt constituent instruments to changing circumstances. As a matter of course it has to meet much stricter requirements than subsequent practice,[55] for it has a greater impact on the constituent instruments and bears the danger of abuse and circumvention of formal revision procedures.

Such requirements for practice to be *established* are described in the ILC draft commentary to the VCLT-IO: established practice must not be uncertain or disputed.[56] There are convincing teleological reasons to follow the ILC and to abstain from the consideration of *uncertain* practice.

In case of such practice the danger of legal uncertainty is overwhelming: who should decide which one of two or more contradictory practices had to be considered? This would certainly bear the danger of arbitrariness. Practice has to be consistent in order to obtain legal relevance. This holds true both for subsequent practice in order to be considered for

53 Cf. P. Sands & P. Klein, *Bowett's Law of International Institutions*, 6th ed. (2009), para. "14–033"; a notion apparently rejected by C. Brölmann, *The Institutional Veil in Public International Law*, (2007), 114.

54 Draft Art. 68 (c) of the 1964 ILC Draft Articles on the Law of Treaties, *Yearbook of the International Law Commission* (1964), Vol. II, 198; M. Akehurst, 'The Hierarchy of the Sources in International Law', 47 *British Yearbook of International Law* (1974-75), 273, 275-276; N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (1994), 145-157; Villiger, *supra* note 3, 'Issues of Customary International Law', paras 30-33.

55 Cf. with regard to the necessity of stricter requirements for modification than for interpretation through practice: Amerasinghe, *supra* note 45, 463; N. White, *The law of international organizations*, 2nd ed. (2005), 27.

56 Yearbook of the International Law Commission (1982), Vol. II (Part 2), 21, para. 25.

interpretation[57] and for established practice in order to amount to a rule of the organization.

As far as *undisputed* practice is concerned, practice borne by the organs concerned with the matter, supported expressly or impliedly by the Member States, should be required. Protest or negative voting, however, even of a single member would impede such practice for the following reason: an international organization depends on its homogenous legal structure because it is built on cooperation and its work can entirely be stopped by a single Member State. The conditions for the formation of established practice must be stricter than those for the formation of customary law, despite the parallels between them. In contrast to an organization, the international community as a whole can cope with some persistent objectors to rules of customary law.

What is the difference then between established practice amounting to a rule of the organization according to Art. 5 VCLT and subsequent practice according to Art.31 (3) (b) VCLT? While subsequent practice has a contractual nature and is based on the consent of the parties to a treaty, established practice is based on customary law and secondary law of the organization. In other words, subsequent practice is in its tendency party-related and established practice organization-related. Of course there is a significant overlapping, for organs serve both as a forum for representatives of the Member States, who are subject to instructions, and as mechanisms serving the purposes and principles of the organization, which have a momentum of their own. Whereas subsequent practice as codified in Art. 31 (3) (b) VCLT serves the interpretation of pre-existing provisions of the constituent instruments, established practice leads to binding legal (customary) rules, which add to the law of an international organization. One could even go so far to consider it a third source of the law of international organizations, apart from primary and secondary law, with the restriction that secondary law is a decisive factor in its creation.

This is where we come back to the question: are subsequent practice and established practice two sides of the same coin? The answer we have found is that they are not so. On the contrary, the opposite thesis is right, namely, that established practice as contained in Art. 5 VCLT has the potential to modify or even precede Art. 31 (3) (b) VCLT to the

[57] Cf. Karl, 1983, *supra* note 4, 196; I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (1984), 137.

consequence that subsequent practice works differently concerning the interpretation of constituent instruments.

E. The Interplay between Subsequent Practice and Established Practice

In order to figure out the exact interplay between subsequent practice and established practice, the general relationship between the rules of the organization and the VCLT must be considered. Do they take the place of the law of treaties or do they just modify it?

I. The General Relationship between the Rules of the Organization and the Provisions of the VCLT

Rosenne showed that the relationship between the rules of the organization and the provisions of the VCLT was linked with and determined by the legal nature of the constituent instrument of an international organization, whether it is to be considered rather a multilateral treaty with some few specific characteristics or an instrument *sui generis*, of a constitutional character.[58] This legal nature of the constituent instruments and the antagonism between treaty and constitution is a much-discussed topic.[59] Of course, the character of the constituent instrument as the constitution of a single international organization is referred to here (or basic instrument, setting up its organs, their powers and the relationship between each other and with the Member States) and not as constitution of the international community as a whole,[60] concepts which must be distinguished.[61] It cannot and shall not be the task of this essay to find an answer to the question of treaty or constitution. The debate characterized by approaches varying from extreme answers (basically a treaty[62] or a

58 Rosenne, *supra* note 14, 191-200.

59 Cf. Use by a State of Nuclear Weapons, *supra* note 3, 75; Certain Expenses, *supra* note 30, 157; J. Alvarez, *International Organizations as Law-Makers* (2005), 65-74; Fassbender, *supra* note 13, 529; J. Klabbers, *An Introduction to International Institutional Law*, 2nd ed. (2009), 74-76; Rosenne, *supra* note 14, 191-200; White, *supra* note 55, 14-23.

60 On the UN Charter: Fassbender, *supra* note 13.

61 Cf. Ruffert & Walter, *supra* note 45, para. 135.

62 Cf. Certain Expenses, *supra* note 30, 157.

constitution[63]) to more mediating ones[64] rather illustrates that there might be no definite answer, but that the reply coming closest to reality is both, treaty and constitution. And the emphasis depends on the institutional arrangement of the specific international organization.

This has effect on the relationship between the rules of the organizations and the provisions of the VCLT. The dividing line between the law of treaties and the rules of the organization should be as flexible as the dividing line between treaty and constitution. Therefore, a flexible and balanced approach[65] is preferable over a strict rule of precedence.

Rosenne, for example, who referred to the *lex specialis* rule when interpreting Art. 5 VCLT, sometimes seems to understand it as a strict collision rule[66] and sometimes as a way to balance between the VCLT and the rules of the organization.[67] Both interpretations of the *lex specialis* rule are, generally speaking, possible. In some cases it can provide for a strict exception from a general rule, for a kind of precedence, in other cases it might only substantiate the general rule for a special case. The first understanding leads to the alternative of either applying a provision of the VCLT or a rule of the organization, but no middle course, no balance would be possible. The second understanding means that both rules are applicable at the same time. Thus, the *lex specialis* only specifies and substantiates the *lex generalis*, but does not enjoy complete precedence. Therefore, it is necessary to find a balance between the competing aspects of both rules,[68] so that the correct approach in the case of the *lex generalis* contained in the VCLT and the *lex specialis*, the rules of the organization, is the second one.

This is not only due to the character of constituent instruments as a mixture of treaty and constitution. There are further arguments in favor of a flexible and balancing approach. First, the decision of the Vienna Conference to replace the words of the then ILC Draft Articles 4 "[…] *shall*

63 E.g. regarding the UN Fassbender, *supra* note 13.

64 E. Klein, in Graf Vitzthum, *supra* note 3, paras 37-38.

65 Cf. Spanish Delegation, United Nations Conference of the Law of Treaties, Official Records, 1st session (1968), *supra* note 25, 44, paras 23-30; Villiger, *supra* note 3, Art. 5, para. 7.

66 Rosenne, *supra* note 14, 211.

67 Rosenne, *supra* note 14, 257.

68 Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by M. Koskenniemi, UN Doc. A.CN.4/L.682, 13 April 2006, 46-47.

be subject to[69][…]" with "[…] *without prejudice to*[70] the relevant rules of the organization" is such an argument. This change in the language used was indeed a development from a strict rule of precedence to a more flexible protection of the characteristics of the organizations. Second, as previously mentioned, the object and purpose of Art. 5 VCLT is to provide for a comprehensive application of the Convention to the constituent instruments of international organizations, but with regard to their needs and special qualities.[71] To follow a strict method of delimitation would often mean either deny the application of the general law of treaties as codified in the Vienna Convention and thus to favor the fragmentation of this field of international law or to apply a general rule, which can in principle assist in the solution of the legal problem at hand, but only in principle. Third, there are many different categories of international organizations, all of them with their particular needs. There are universal and regional organizations, administrative and political organizations, economic and security organizations and many more. The cases in which a general rule from the VCLT will fit all of them will be rare.

What, then, is exactly envisioned as a balanced or "flexible" approach? It would mean modifying the respective provision of the VCLT according to the rules and the character of the particular organization and according to the relevant field of the law of treaties. On a more abstract level, this would mean taking into consideration, on the one hand, the equal rights of the Member States in connection with the principle of consent and the treaty base of the constituent instrument; and, on the other hand, the constitutional character of the instrument, the procedural autonomy, own legal personality or the often exerted own life of the organization,[72] and to balance these competing aspects.

This approach, which admittedly does not give clear criteria and leaves a broad margin of appreciation for those who apply the law, could be criticized for opening the floodgates to legal uncertainty. Yet the balancing of the rules of the organization and the provisions of the VCLT is nothing more than a process of interpretation. Interpretation is neither an exact science nor craft, but (depending on the degree of certainty of the provision

69 Italics added.
70 Italics added.
71 Cf. Spanish Delegation, United Nations Conference of the Law of Treaties, Official Records, 1st session (1968), *supra* note 24, 44, paras 23-30.
72 See *supra* note 13.

to be construed) a sometimes rather open process, even though it would go too far to speak of interpretation as an art.[73] The only thing legal science can do to contribute to the simplification and legitimacy of the process is to provide for rules and methods predetermining the result of interpretation as well as possible.

II. Art. 5 VCLT and Art. 31 (3) (b) VCLT

Having outlined the general relationship between the rules of the organization and the law of treaties in general terms, it is now possible to apply this theoretical background to the concrete example set out at the beginning, *i.e.*, the influence of established practice/rules of the organization on Art. 31 (3) (b) VCLT as regards the conditions for interpretation of the constituent instruments in the light of practice. The interesting questions are whether Art. 31 (3) (b) VCLT can at all be applied to the practice of an organization, especially that of organs; and whether the same demands have to be placed on such practice, that is, to be the expression of agreement by *all* the Member States of the organization.

It can be observed that the language used in Art. 31 (3) (b) VCLT does not exclude the consideration of organ practice. It can also be practice of organs that establishes or represents the agreement of the parties; it need not be the parties themselves performing the practice.[74] Thus it is, for example, possible that the decisions or resolutions of a plenary organ reflect the agreement of the parties regarding the interpretation of the constituent instrument.

A more interesting situation, however, arises when there is no such clear case: in other words, when we face the practice of an organ with

[73] See for this debate e.g. M. Bos, 'Theory and Practice of Treaty Interpretation', 27 *Netherlands International Law Review* (1980) 1, 3, 17-18; Klabbers, *supra* note 59, 86; K. Schmalenbach, 'Die rechtlicheWirkung der Vertragsauslegungdurch IGH, EuGH und EGMR', 59 *Austrian Journal of Public and International Law* (2004), 213, 215.

[74] Alvarez, *supra* note 58, 87; R. Gardiner, *Treaty Interpretation* (2008), 247-248; E. Klein, 'Vertragsauslegung und spätere Praxis Internationaler Organisationen', in Bieber & Ress, *supra* note 11, 101, 102; Lauterpacht, *supra* note 45, 460-461, considers institutional practice an independent concept. This opinion is shared by Schermers & Blokker, *supra* note 14, para. 1347; Spender completely denied the relevance of organ practice as such: Separate Opinion of Judge Spender, Certain Expenses, *supra* note 30, 182.

limited membership that does not encounter much reaction from the other states. Under Art. 31 (3) (b) VCLT in its pure and unmodified form such practice should be, generally speaking, not relevant for interpretation, as it is undisputedly considered to require the agreement of *all* parties.[75] However, implied agreement, tacit agreement (acquiescence) and estoppel are discussed in the scope of Art. 31 (3) (b) VCLT,[76] which already render this requirement as less absolute.

In international organizations their established practice or, respectively, their tradition of interpretation[77] can influence Art. 31 (3) (b) *via* Art. 5 VCLT to the effect that the requirement of an agreement of the parties is further softened. In other words, it can be established practice and thus a (customary) rule of the organization that the practice of its organs deserves more weight in the interpretation and application of its constituent instruments and becomes more independent from the agreement of the parties. The intensity of this effect will depend on the organization, its particular established practice, the degree of autonomy and the set of rules to be interpreted. This is nothing but the implementation of the flexible approach, the balancing of Art. 31 (3) (b) VCLT with the rules of the respective organization.

In the following, only some possible implications of this theoretical background shall be outlined.[78] The influence of established practice can have the effect that no express or even implied agreement of all the Member States would be required, but a simple lack of reaction to consistent practice by some Member States – or even the majority – would be no harm. Such a result is, in addition to the effect of established practice, also supported by deliberations based on acquiescence: with a high degree of institutional cooperation goes a higher standard of care. This means that there are higher expectations on the Member States to participate and a lack of reaction to consistent institutional practice is, even if the State does not know about it, also a lack of interest, care and participation.

75 See *supra* note 4.

76 Karl, 1983, *supra* note 4, 276-281, 324-339; *Temple of Preah Vihear (Thailand v. Cambodia)*, Judgment, ICJ Reports 1962, 6, 23, 30-33.

77 Karl, 1987, *supra* note 11, 90-91.

78 They should not be considered definitive, but on the contrary, they are theses which need further theoretical *and* empirical research for their verification, which will be done, *inter alia*, in the author's dissertation project.

On account of the higher expectations to participate, the State can be required to stay informed on such practice if it wants to impede it. Practice of an organ without negative feedback from the States would not be entirely independent or autonomous, but it would remain covered by the Member States' assent and be within the framework of an Art. 31 (3) (b) VCLT modestly modified or redefined.

An unresolved problem connected with such a role of practice, however, is one of good faith (as reflected by Art. 26 VCLT). Some smaller States simply lack the resources to stay informed about every practice taking place in every organ. There are several thinkable mechanisms to resolve this issue: First, to ignore it and insist on the principle of sovereign equality. Second, to apply different standards of care to States with different resources. Third, to impose duties on States or neutral organs to inform about practice. All these mechanisms have serious disadvantages. The shortcoming of the first one is obvious; the second and the third one are impractical and hardly implementable in the decentralized system of international law. This is one of the issues demanding further reflection.

Protest or negative voting of a single Member State can *in principle* impede the impact of subsequent practice on the constituent instrument, and it will – at least in theory – always impede the creation of established practice, due to its more serious effects on the organization and its legal framework. Otherwise, there would be the danger that some Member States might lose their influence on the development of the organization. This would impair their equal rights as founders and members of the organization and bear the danger of serious conflicts within the membership, doing harm to the common goals pursued in the cooperative framework of the organization.[79] Yet the reservation *in principle* has to be taken seriously, as there will be cases in which even the protest of several parties cannot impede the impact of the subsequent practice on the interpretation of the constituent instrument if the rules of the organization or the established practice say so. These cases would principally concern rather internal or procedural matters of, for example, the organ which performed the practice,[80] i.e. matters that do not directly affect the protesting member(s) and are, in contrast, determined by the independent or autonomous character

79 See chapter D.

80 Cf. Certain Expenses, *supra* note 30.

of the organization, its so called "*own life*".[81] Thus even autonomous organ practice is possible.[82]

There is evidence in some advisory opinions of the ICJ which supports the foregoing considerations. In *Certain Expenses*, the Court used resolutions of the General Assembly for the interpretation of Art. 17 (2) UN Charter which were not unanimous.[83] In *Namibia*, it made reference to the consistent practice of the Security Council when it decided that abstentions of permanent members should be considered as concurring votes in terms of Art. 27 (3) UN Charter. It did so with reference to a general acceptance by the Member States, which, however, was not substantiated.[84] In the *Wall* Opinion the Court interpreted Art. 12 UN Charter in the light of the practice of the General Assembly and the Security Council, without considering the character of the Council as an organ of limited membership, the voting within both organs and the position of the Member States on that issue.[85]

Though these three advisory opinions do not expressly support the justification of such organ practice based on Art. 5 VCLT, the Court referred to the relevant rules of the organization when interpreting the WHO Constitution in the *Use of Nuclear Weapons* advisory opinion.[86] This can easily be understood as a reference to the manifestation of Art. 5 VCLT as a rule of customary law. It referred expressly to Art. 31 (3) (b) VCLT and applied it in the interpretation of the WHO constitution, considering the practice of the organization. The Court did so, however, without addressing on the method with which the rules of the organization could be harmonized with the provisions of the VCLT.[87]

81 See *supra* note 13.

82 Cf. with different arguments Amerasinghe, *supra* note 45, 52-55.

83 Certain Expenses, *supra* note 30, 174.

84 Namibia, *supra* note 30, 22, para. 22.

85 Wall Opinion, *supra* note 15, 149-150; the Court only refers to the "accepted practice of the General Assembly", but it does not specify the nature and scope of this "acceptance". Indeed, the three General Assembly Resolutions expressly (yet incorrectly) quoted in the opinion in support of this interpretation of Art. 12 of the UN Charter (the Court probably referred to GA Res. 1599 (XV), 15 April 1961; GA Res. 1600 (XV), 15 April 1961; GA Res. 1913 (XVIII)) were all adopted against several negative votes, see the statistics at http://www.un.org/depts/dhl/resguide/r15.htm and http://www.un.org/depts/dhl/resguide/r18.htm (last visited 9 August 2011).

86 Use by a State of Nuclear Weapons, *supra* note 3, 74-75.

87 The Court only talks about "elements which may deserve special attention when the time comes to interpret these constituent treaties", ICJ, *id.*,75.

Finally, the introductory example, the *Construction of a Wall* opinion read together with *Use of Nuclear Weapons*,[88] can be connected with the theoretical background, that is, the concept of established practice, the balancing approach and the softening of the agreement of the parties as condition for relevant subsequent practice as outlined above. The consideration of organ practice by the Court without a thorough examination of voting and support from the member states can be explained, inter alia, with established practice, a (customary) rule of the United Nations, giving more weight to the (subsequent) practice of its organs and reducing the requirements for the agreement of the Member States.[89]

F. Conclusions and Perspectives

Subsequent practice and established practice are not two sides of the same coin, as the British representative in the Sixth Committee of the General Assembly suggested, but two concepts which should be distinguished. Subsequent practice according to Art. 31 (3) (b) VCLT is a method of interpretation which finds its contractual basis in the agreement of the parties to a treaty/a constituent instrument, whereas established practice is a kind of quasi-customary law of an international organization, which is primarily, but not exclusively, based on its secondary law. It can even be referred to as a third source of the law of international organizations. Since it can amount to a rule of the organization according to Art. 5 VCLT, it has the potential to modify wide parts of the law of treaties (or perhaps even the constituent instruments of international organizations themselves).

88 See chapter A.

89 It should be noted, however, that there are also good arguments that the adaptation of Art. 12 UN Charter in practice rather led to an informal amendment or modification of this provision: K. Hailbronner & E. Klein, 'Article 12', in B. Simma, *The Charter of the United Nations*, Vol. 1, 2nd ed. (2002), paras 22, 31. Consequently, this would be no case of subsequent practice made possible by established practice, but a rather questionable case of established practice against the negative votes or protest of a minority of Member States. For the present article, which cannot extensively discuss the distinction between interpretation and amendment, the assumption of the Court that Article 12 UN Charter has merely been reinterpreted, expressed in Wall Opinion, *supra* note 15, 149, para 27, serves as a basis. Certain Expenses, *supra* note 30, however, is also a very good example of established practice reducing the requirements for interpretation in the light of subsequent practice.

This holds also true for Art. 31 (3) (b) VCLT and subsequent practice. The established practice of an organization can reduce the requirements for an agreement of the parties as regards subsequent practice of its organs. Possible implications are that an express or implied agreement of all Member States would not be necessary, but that a simple lack of reaction of a minority of Member States would not render the subsequent practice irrelevant. Even autonomous organ practice is possible.

Subsequent practice and established practice are significant concepts of the law of treaties and of the law of international organizations. Established practice is a hinge between both fields of law and an instrument to replenish the constituent instruments with suitable regulations. Subsequent practice has the potential to further develop the law of international organizations and to adapt it to current exigencies. The former can promote the latter.

Both concepts, however, also bear risks. Codifications like the VCLT shall promote legal certainty, but they still depend on quasi-customary concepts, such as established practice, to fit into the structure of international law. Subsequent practice and established practice lack the legitimacy that formal amendment procedures possess. They could even contribute to the fragmentation of international law, as informal development of legal regimes can cause them to depart from each other step by step. At the same time, established practice contributes to a contrary process in bringing together the law of treaties and the law of international organizations. However, both the opportunities of a more flexible adaptation of international law to new challenges and the risks may illustrate why subsequent practice and established practice matter and why their interplay deserves our attention.