1. Introduction

Article 2(b) on the use of terms of the articles on the responsibility of international organizations provides that, for the purposes of the articles, ‘rules of the organization’ means, in particular, ‘the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization’.

Reference to the practice of an international organization is unevenly found in international instruments, court decisions and academic writings. Yet, the concept of practice acquires fundamental importance, as most international organizations increasingly expand their activities, which in turn leads to more instances where practice plays a key role in allocating responsibility. This is therefore a promising area of research from the perspective also of international relations.

In addressing this theme, this contribution will show how the application of seemingly identical expressions such as ‘practice’, ‘established practice’ and ‘subsequent practice’ varies according to the relevant regulative instrument, thus calling for a cautious approach.

2. Variations of the Concept in International Instruments

The Vienna Convention on the Law of Treaties\(^1\) provides in article 5 that the convention applies to the constituent instruments of international organizations and to ‘any treaty adopted within an international organization without prejudice to any relevant rules of the organization’. This article, which has a residual

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\(^{1}\) 1155 UNTS 331.
character, provides that the relevant rules of the organization may indeed have to be taken into account. And Mustafa Kamil Yasseen, the president of the drafting committee at the Vienna conference that led to the adoption of the Convention, confirmed that the term ‘rules’, in what was then draft article 4, ‘applied both to written rules and to unwritten customary rules’.

Article 5 of the Vienna Convention seeks to avoid obstacles to the internal legal order of an international organization, underlines the dynamics of its function, and strengthens solidarity among the member States of an organization. At the Vienna conference, the UK suggested introducing after the words ‘relevant rules’ the expression ‘and established practice’. Also, participant organizations proposed the addition of the term ‘practices’ to ‘rules’. These proposals were not adopted. As a result, the Convention confines the exception to the ‘rules of the organization’. Commentators diverge in assessing that provision. Some argue that article 5 most likely introduced an element of progressive development, ‘which in the meantime has doubtlessly developed into customary law’. Another opinion finds in the provision elements of flexibility and clarity, while a third one contends that it reflects ambiguity, as it neither specifies the field of application of the different rules nor offers a solution in case of conflict.

During the elaboration by the International Law Commission of what later became the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (which has not yet entered into force), Abdullah El-Erian, the Special Rapporteur, indicated that, while the United Nations have developed a system of addressing issues related to the item under discussion, the practices of the specialized agencies ‘were fragmentary and far from systematized’, and in some cases there was no information on what was their practice. Some members of the Commission argued that the rules should reflect an established practice. In a number of instances, the Commission used examples of a ‘well-established practice’ of States to draw a parallel with what was to be understood as ‘practice of the organization’.

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6 Ibid., 121.
7 Mentioned ibid.
9 A/CONF.67/16.