

**435**

---

2024



# ACADEMIE DE DROIT INTERNATIONAL

FONDÉE EN 1923 AVEC LE CONCOURS DE LA  
DOTATION CARNEGIE POUR LA PAIX INTERNATIONALE

# RECUEIL DES COURS

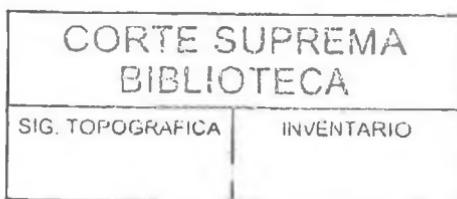
COLLECTED COURSES OF THE HAGUE  
ACADEMY OF INTERNATIONAL LAW

2024

*Tome 435 de la collection*

BRILL | NIJHOFF

Leiden/Boston



**GENERAL TABLE OF CONTENTS**  
**TABLE GÉNÉRALE DES MATIÈRES**

Rethinking the United Nations: 75 and Beyond, by Nawaf SALAM, Judge at the International Court of Justice. . . . .	9-32
Le rôle du droit international dans le contrôle des sentences arbitrales, par Dominique HASCHER, Juge international à la Cour suprême de Singapour . . . . .	33-72
Legal Facets of the Practice of International Organizations, by Niels BLOKKER, Professor at Leiden University . . . . .	73-324



## TABLE OF CONTENTS

Rethinking the United Nations: 75 and Beyond . . . . .	17
--	----

## TABLE DES MATIÈRES

Introduction . . . . .	41
Chapitre 1. L'attraction du droit international . . . . .	43
A. Le droit international régit la sentence . . . . .	43
B. La force du droit international . . . . .	47
Chapitre 2. Le droit international, élément modérateur du contrôle . . . . .	52
A. S'introduire dans le fond? . . . . .	52
B. Les limites . . . . .	58
Chapitre 3. Un contrôle nourri de principes universellement reconnus, élevés au rang de principes de droit international, à titre de langage commun . . . . .	61
Conclusion . . . . .	69

## TABLE OF CONTENTS

Introduction . . . . .	87
Chapter 1. Practice as a rule: “established practice” as part of the law of international organizations . . . . .	95
1.1. Origin and development . . . . .	95
1.2. Some examples of the established practices of international organizations . . . . .	103
1.2.1. A wealth of “unknown” established practice . . . . .	103
1.2.2. The study by Christopher Peters . . . . .	104
1.2.3. Practice of the United Nations and the specialized agencies . . . . .	108
(i) Examples from the <i>United Nations Juridical Yearbook</i> . . . . .	108
(a) UN conferences . . . . .	109
(b) UN peacekeeping . . . . .	110
(c) The UN Secretariat as a depositary of multilateral treaties . . . . .	112
(d) The relations between organizations and their staff . . . . .	113
(e) The conduct of meetings and the daily operation of organs . . . . .	114
(f) Issues of representation, the leadership role of the General Assembly . . . . .	115
(g) Privileges and immunities . . . . .	116
(ii) A few observations . . . . .	117
1.3. Some further reflections on the notion of “established practice of the organization” . . . . .	121
1.3.1. The most dynamic component of rules of international organizations . . . . .	121
1.3.2. To define or not to define? . . . . .	122
1.3.3. A wealth of undocumented, little-known practices . . . . .	123
1.3.4. When is a practice “established”? . . . . .	125
1.3.5. Who decides? . . . . .	128
Chapter 2. Practice as a power: the power-generating capacity of the practice of international organizations . . . . .	131
2.1. “Clean theory”: The principle of attributed powers . . . . .	131
2.2. “Messy life”: Examples from practice – <i>intra</i> or <i>ultra vires</i> ? . . . . .	138
2.2.1. The establishment of <i>ad hoc</i> criminal tribunals by the UN Security Council . . . . .	138
2.2.2. Was the UN Human Rights Council Libya Inquiry Commission acting <i>ultra vires</i> by including NATO operation Unified Protector in its report (2012)? . . . . .	142
2.2.3. Julian Assange in the Embassy of Ecuador in London: Voluntary stay or arbitrary deprivation of liberty? Was the UN Working Group on Arbitrary Detention competent to consider the case of Julian Assange? . . . . .	144
2.2.4. Was the OPCW acting <i>ultra vires</i> by deciding in June 2018 that the OPCW Secretariat may play a role in identifying “those who were the perpetrators, organisers, sponsors or otherwise involved” in the use of chemical weapons? . . . . .	146
2.2.5. Does NATO have the power to carry out “out of area operations”? . . . . .	150

2.2.6. The power of the CTBTO PrepCom to use its verification installations not only for nuclear explosions but also for tsunami warning . . . . .	153
2.3. Bridging the gap ( <i>i</i> ): Amending the constituent instrument . . . . .	157
2.4. Bridging the gap ( <i>ii</i> ): Implied powers . . . . .	160
2.4.1. Implied powers and the principle of attribution . . . . .	162
2.4.2. The scope of implied powers . . . . .	163
2.4.3. Inherent powers . . . . .	167
2.5. Bridging the gap ( <i>iii</i> ): Organizational practice and the conundrum of customary powers . . . . .	168
2.6. How to read the “open book” of “messy practice” in the light of express, implied and customary powers? . . . . .	177
2.6.1. The establishment of ad hoc criminal tribunals by the UN Security Council . . . . .	177
2.6.2. Was the UN Human Rights Council Libya Inquiry Commission acting <i>ultra vires</i> in discussing NATO operation Unified Protector in its report? . . . . .	178
2.6.3. Was the UN Working Group on Arbitrary Detention competent to consider the case of Julian Assange? . . . . .	179
2.6.4. Was the OPCW acting <i>ultra vires</i> by deciding in June 2018 that the OPCW Secretariat may play a role in identifying “those who were the perpetrators, organisers, sponsors or otherwise involved” in the use of chemical weapons? . . . . .	179
2.6.5. Does NATO have the power to carry out “out of area operations”? . . . . .	179
2.6.6. The power of the CTBTO Prepcom to use its verification installations not only for nuclear explosions but also for tsunami warning . . . . .	180
2.7. In conclusion: Practice, the attribution principle, and beyond . . . . .	180
<b>Chapter 3. Practice in interpretation: practice of international organizations as an interpretative device . . . . .</b>	<b>182</b>
3.1. Introduction . . . . .	182
3.2. The rules on treaty interpretation in the 1969 and 1986 Vienna Conventions and practice of international organizations . . . . .	184
3.2.1. The Vienna rules on treaty interpretation . . . . .	185
3.2.2. Treaty interpretation and the practice of international organizations . . . . .	188
3.3. The role of practice of international organizations in the interpretation of treaties to which they are parties . . . . .	193
3.4. The role of practice of international organizations in the interpretation of their constituent instruments . . . . .	195
3.4.1. A special approach for the interpretation of constituent instruments? . . . . .	195
3.4.2. Interpretation of constituent instruments: The 1996 ICJ Advisory Opinion requested by the WHO . . . . .	199
3.4.3. Limits to the interpretation of constitutions? The work of the Institut de Droit International . . . . .	204
3.5. The role of organizational practice in the interpretation of other rules of international organizations . . . . .	210
3.6. The interpreter I: (Organs of) the organization . . . . .	217
3.7. The interpreter II: The members – membership support for an interpretation by the organization . . . . .	224
3.8. In conclusion: Practice, interpretation, and beyond . . . . .	231

Chapter 4. The international court of justice and practice of international organizations . . . . .	234
4.1. Introduction . . . . .	234
4.2. The Permanent Court of International Justice . . . . .	236
4.2.1. Competence of the ILO in regard to international regulation of the conditions of the labour of persons employed in agriculture (1922) . . . . .	237
4.2.2. Competence of the ILO to regulate incidentally the personal work of the employer (1926) . . . . .	238
4.2.3. Jurisdiction of the European Commission of the Danube (1927). . . . .	239
4.3. The International Court of Justice . . . . .	240
4.3.1. Early references to the practice of (organs of) the organization . . . . .	240
(i) Conditions of Admission (1948) . . . . .	240
(ii) Reparation for Injuries (1949) . . . . .	241
(iii) Second Admission Case (1950) . . . . .	242
(iv) International Status of South West Africa (1950) . . . . .	243
(v) Judgments of the ILO Administrative Tribunal in cases against UNESCO (1956) . . . . .	244
(vi) Constitution of the Maritime Safety Committee of IMCO (1960) . . . . .	245
4.3.2. Certain Expenses (1962). . . . .	246
(ii) Background. . . . .	246
(ii) The Advisory Opinion. . . . .	249
(iii) Separate and Dissenting Opinions: Judge Spender . . . . .	251
4.3.3. Namibia (1971). . . . .	256
4.3.4. WHO Nuclear Weapons (1996) . . . . .	259
4.3.5. Further references to organizational practice, post <i>WHO Nuclear Weapons</i> . . . . .	263
(i) Cumaraswamy (1999). . . . .	264
(ii) Legal consequences of the construction of a wall in the Occupied Palestinian Territory (2004) . . . . .	264
(iii) Accordance with international law of the unilateral declaration of independence in respect of Kosovo (2010) . . . . .	266
(iv) Chagos (2019). . . . .	267
4.4. Concluding observations . . . . .	268
Chapter 5. The international law commission and practice of international organizations . . . . .	273
5.1. Introduction . . . . .	273
5.2. The ILC, customary international law and practice of international organizations . . . . .	275
5.2.1. Introduction. . . . .	276
5.2.2. The work of the ILC on the “identification of customary international law” . . . . .	279
(i) Direct relevance of the practice of international organizations, “in certain cases” . . . . .	280
(ii) Observation 13 . . . . .	281
(iii) Observation 14 . . . . .	281
(iv) Resolutions of international organizations . . . . .	286
(v) Other issues and comments. . . . .	289

5.3. Subsequent agreements and subsequent practice in relation to interpretation of treaties: What role for the practice of international organizations? . . . . .	290
5.3.1. Introduction. . . . .	290
5.3.2. The ILC Study Group on “Treaties over time” (2009-2012). . . . .	291
5.3.3. The ILC work on the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” (2013-2018). . . . .	292
5.3.4. Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (2018) . . . . .	297
5.4. Concluding observations: Does the ILC take the practice of international organizations seriously? . . . . .	302
Concluding observations . . . . .	307
Legal facet one: Practice as a rule . . . . .	307
Legal facet two: Practice as a power. . . . .	309
Legal facet three: Practice in interpretation . . . . .	310
Legal facet four: The ICJ and the practice of international organizations . . . . .	312
Legal facet five: The ILC and the practice of international organizations	313
Bibliography. . . . .	318