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# The Charter of the United Nations: A Commentary of Bruno Simma's Commentary

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## BOOK REVIEW

# THE CHARTER OF THE UNITED NATIONS: A COMMENTARY OF BRUNO SIMMA'S COMMENTARY

Bruno Simma, Hermann Mosler, Albrecht Randelzhofer, Christian Tomuschat, Rüdiger Wolfrum, Andreas Paulus, Eleni Chaitobu eds., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY. New York: Oxford University Press, 2002. lxiv + 1405.

*Reviewed by Alain Pellet**

This second edition of Bruno Simma's masterpiece witnesses the deserved success of the first edition, published in the early 1990s in German,[1] then English.[2] It is a well-organized article-by-article commentary of the "constitution of the world community,"[3] accompanied with some horizontal presentations which usefully summarize general issues of special interest.[4]

Simma's *Commentary* is not the first article-by-article commentary of the Charter of the United Nations. He has been preceded, for example, by Kelsen,[5] Goodrich and Hambro,[6] and Cot and Pellet,[7] the last being comparable in many respects to the present work: the commentaries have been drafted by a collection of authors (eighty-two authors in Cot and Pellet; seventy-four in Simma)[8] who share in common the same mother tongue. Beyond the diversity of points of view, this feature endows both books with some kind of unity, the "Frenchness" of Cot and Pellet's contrasting in many respect with the "Germanness" of Simma's.

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1. CHARTA DER VEREINTEN NATIONEN: KOMMENTAR (Bruno Simma et al. eds., 1991).

2. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma et al. eds., 1995) [hereinafter CHARTER COMMENTARY 1ST ED.].

3. Georg Ress, *The Interpretation of the Charter*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 16 (Bruno Simma et al. eds., 2d ed. 2002).

4. *E.g.*, history, interpretation, self-determination, peacekeeping.

5. HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS (1951).

6. LELAND M. GOODRICH, ET AL., CHARTER OF THE UNITED NATIONS (3d ed. 1969).

7. JEAN-PIERRE COT & ALAIN PELLET, LA CHARTE DES NATIONS UNIES—COMMENTAIRE ARTICLE PAR ARTICLE (2d ed. 1991) (A third edition, which should be translated into English, is being prepared and should be published in late 2004).

8. *See id.* at xi–xiv; THE UNITED NATIONS: A COMMENTARY (Bruno Simma et al. eds., 2d ed. 2002) [hereinafter CHARTER COMMENTARY] (Curiously enough, in his preface, Simma only counts sixty-one authors. I have checked and I count seventy-four names).

While the first edition was initially written in German, then translated into English by the authors themselves, Simma's second edition only appears in English. Reasonably expanded,[9] enriched by the contribution of twenty-two new authors or co-authors, the book is up to date until the end of 2001, a year when a new turning point took place in international relations and in the life of the United Nations following September 11.[10] However, this new (and unfortunate) course has been partly anticipated by Simma and his team of authors.

As the editor writes in his preface: against the background of the new developments, the book claims to be "a strong plea to handle the only truly universal world organization that we have with greater care."[11] This was written with the Kosovo crisis in mind when "the world watched multilateral recourse to large-scale use of military force in the absence of Security Council authorization."[12] But, indeed, the worse was to come with the invasion of Iraq by a non-authorized self-proclaimed "coalition" based on a probably deliberate distortion of the true situation regarding mass-destruction weapons in that country and, more generally, the systematic recourse by the United States to unilatelarism and the methodical calling into question of the international legal system as conceived after World War II by the Bush Administration.

In this respect, the *Introduction to Chapter VII* by Frowein and Krisch is particularly enlightening even though, seen in retrospect, it now appears somehow excessively optimistic.[13] The authors show, both concisely and persuasively, how, after the end of the Cold War and a brief period of dramatically expanded use of the enforcement *Charter* mechanisms during the early 1990s, the Security Council developed more sophisticated, effective and better "targeted" instruments, which may sometimes be seen as exceeding the framework of the *Charter* as established in 1945 inasmuch as the measures taken amount to the exercise of a quasi-judicial function which does not belong to the Council.[14]

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9. Scarcely 150 pages more, which is a remarkable achievement given the tremendous changes in U.N. practice; the moderation of this increase witnesses the care with which the whole book has been reviewed and the dead wood pruned down.

10. The September 11th attack is only taken into consideration marginally. *See* Jochen Abr. Frowein & Nico Kirsch, *Introduction to Chapter VII*, *in* CHARTER COMMENTARY, *supra* note 8, at 709, 726; Albrecht Randelzhofer, *Article 51*, *in* CHARTER COMMENTARY, *supra*, at 802. Some commentaries include events as recent as spring 2002. *See, e.g.*, Carl-August-Fleischhauer, *Article 13*, *in* CHARTER COMMENTARY, *supra*, at 316 (non-ratification of the International Criminal Court treaty by the U.S.); *Frowein & Krisch*, *supra*, at 704 (economic sanctions).

11. CHARTER COMMENTARY, *supra* note 8, at vii.

12. *Id.*

13. *See* Frowein & Krisch, *supra* note 10, at 701–16.

14. *See also* Frowein & Krisch, *Article 41*, *in* CHARTER COMMENTARY, *supra* note 8, at 738; Frowein & Krisch, *Article 42*, *in* CHARTER COMMENTARY, *supra*, at 752–53.

According to Frowein and Krisch, this also holds true regarding the quasi-legislative functions, which may exceed the police function endowed to it. Resolution 1373 probably is the most extreme example of such a trend, which clearly implies a significant change in the general conception of the *Charter*.[15]

I share the concerns expressed by Frowein and Krisch, and I think that the U.N. is not a legislative body and should not be regarded as such. However, it has now become apparent that this "overextension" was but a paranthetical and that, with the 2003 Iraqi crisis, the whole U.N. system has jumped out of the frying pan into the fire: it has been—partly—overused after September 11 and entirely ignored in the third Gulf War.[16]

In the concluding remarks of their remarkable commentary of Article 27, Simma, Brunner and Kaul write:

> [I]n view of the developments that marginalized the role of the U.N. in the Kosovo case of 1998–99, the exercise of the veto in a manner consistent with the special responsibilities of the permanent members of the Security Council and only in instances when they consider a question of vital importance, taking into account the interests of the U.N. as a whole, must be seen as a condition for the survival of the Charter system of peace and security.[17]

This "Jean-Jacques Rousseau-like"[18] approach is attractive at first glance but debatable upon further thought: the determination of what constitutes "a question of vital importance" is highly subjective as is the assessment of "the interests of the UN as a whole."[19] Moreover, this proposal does not really meet the main point; the question is not so much the veto itself than the circumventing strategies used in order to overcome the threat of a veto. Both in Kosovo and during the 2003 Iraqi crisis, the simple threat of a veto by Russia (and probably China) in the

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15. S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385 mtg., U.N. Doc. S/RES/1373 (2001); *see also* Andreas Paulus, *Article 29*, *in* CHARTER COMMENTARY, *supra* note 8, at 543, 553.

16. On the other hand, the U.S. has interpreted Resolution 1368 as a blank check to use self-defense when, where and the way it deems fit. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001) (condemning "in strongest terms" the terrorist attacks of September 11).

17. Bruno Simma et al., *Article 27*, *in* CHARTER COMMENTARY, *supra* note 8, at 521.

18. According to Rousseau, citizens must vote not with their own interests in view, but those of the Nation as a whole. *See, e.g.*, Jean-Jacques Rousseau, The Social Contract (Christopher Betts trans., 1994) (1762).

19. Simma et al., *supra* note 17; *see also* Jörge P. Müller & Robert Kolb, *Article 2(2)*, *in* CHARTER COMMENTARY, *supra* note 8 (concerning good faith in the use of the veto power). According to Müller & Kolb, there is no satisfactory legal answer to the abuse of the veto, "the law of the Charter rests in this field more than anywhere else a *lex imperfecta*." *Id.* at 98.

first case, and by China, France and Russia in the second instance, deterred the "sermonizers" (NATO, then the U.S. and the U.K.) to come to the Security Council and persuaded them to do without its blessing in gross violation of the *Charter*.[20]

France, in particular, has been accused by the United States and the United Kingdom to have weakened the U.N., while, in that occurrence, it was the real "keeper" of the *Charter* and of the interests of the U.N. as a whole—if those interests are not seen in a short-sighted perspective. Accepting the U.S. *diktat* would, indeed, have kept up appearances of U.N. involvement, but it would have meant that the United Nations was used in the sole view of serving U.S. interests. Whatever the U.S. may think, its interests do not always and necessarily coincide with those of the rest of the world.

The U.S. volte-face *vis-à-vis* the worldwide organization, so clearly manifested in respect with September 11 on the one hand and the Iraqi crisis on the other hand, shows that the U.N. is now seen by the Bush Administration as a tool (of minor importance) for its hegemonic policy. The U.N., however, can also be used as a counterbalance to the now sole superpower.

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Like any treaty, the *Charter* is not a fossilized parchment; it is a living instrument, continuously enriched by interpretation and practice. As Judge Jessup put it in his dissenting opinion under the 1966 *South West Africa* case: "[t]reaties—especially multipartite treaties of a constitutional or legislative character—cannot have an absolutely immutable character."[21] This is particularly true of the *Charter*.

As a result, several Articles of the *Charter* are now dead wood.[22] This is the case of Article 26 foreseeing the establishment of a system

20. Even though it can be sustained that Resolution 1244 sorted out the NATO operations in former Yugoslavia. S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES 1244 (1999). It can be asked whether Resolution 1511 of October 15, 2003 performs the same function in respect with the Coalition War. S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg, U.N. Doc S/RES/1511 (2003).

21. South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 4, 439 (July 18) (Jessup, J., dissenting).

22. Article 43 relating to agreements to be concluded by the Security Council with Members could be classified in such a category, even though Frowein and Krisch, rather optimistically, prefer to analyze it as a possible basis for future agreements. *See Frowein & Krisch*, *supra* note 10, at 763; *see also* Brun-Otto Bryde & August Reinisch, *Article 47*, *in* CHARTER COMMENTARY, *supra* note 8, at 775 (with respect to Article 47 relating to the Military Staff Committee).

for the regulation of armaments by the Security Council,[23] and Article 107 on former World War II enemy states to which, nevertheless, Ress devotes a rather long (and interesting) commentary—a manifestation of the special sensitivity of Germany (and German authors) to this out-of-date issue.[24] Also discussed—although rightly confined to forty pages—are Articles 75 to 91 on the now obsolete trusteeship system.[25] Similarly, as noted by Fastenrath, "Article 73 has . . . largely fulfilled its task."[26]

Moreover, the meaning of many articles has deeply changed with the development of and changes in the international society. As clearly apparent from Grewe and Khan's introductory chapter, *Drafting History*, the United Nations is a creation of World War II; its creation then answered the needs of a world divided into two implacably opposed camps.[27] The Cold War completely changed the deal and the organization had to adapt itself to the new situation: the opposition between the Western and Eastern "blocs" originated in a shift of—if not power, at least, importance—from the Security Council (paralyzed with the veto) to the General Assembly.

This shift had consequences not only in the field of the maintenance of international peace and security—as witnessed by the famous (sometimes held as being infamous—but alternatively by the various components of the international system) "Uniting for Peace" Resolution.[28] This resolution, in turn, "served as an authorization for peace-keeping actions and for the convocation of special emergency sessions,"[29] and also, and probably even more significantly, established the relative weight of the various subject matters within the competence of the U.N.

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23. Han-Joachim Schütz, *Article 26*, *in* CHARTER COMMENTARY, *supra* note 8, at 464. According to Theodor Schweisfurth, Article 34 on the Security Council's investigation on disputes or situations the continuation of which "is likely to endanger the maintenance of international peace and security" also "'fell asleep' in the early years of the U.N. [and] has remained in this state until now." Theodor Schweisfurth, *Article 34*, *in* CHARTER COMMENTARY, *supra* note 8, at 606–07. This assertion, however, lays on a rather restrictive interpretation of this provision. *See id.* at 596–98.

24. Georg Ress, *Article 107*, *in* CHARTER COMMENTARY, *supra* note 8, at 1330.

25. Dietrich Rauschning, *Article 75*, *in* CHARTER COMMENTARY, *supra* note 8, at 1099–1139.

26. Ulrich Fastenrath, *Article 73*, *in* CHARTER COMMENTARY, *supra* note 8, at 1096. Curiously (at least from a legal point of view), Fastenrath seems to hold Article 73 as applicable to "the French overseas *départements*," although they are not listed among the non-self governing territories by the Decolonization Committee. *Id.*

27. Wihelm Grewe & Daniel Erasmus Khan, *Drafting History*, *in* CHARTER COMMENTARY, *supra* note 8, at 1.

28. G.A. Res. 377(V), U.S. GAOR, 5th Sess., U.N. Doc. A/1481 (1950).

29. Kay Hailbronner & Eckart Klein, *Article 10*, *in* CHARTER COMMENTARY, *supra* note 8, at 266.

As rightly stressed by several contributors, the General Assembly is "the world's most important political discussion forum,"[30] and "provides an instrument for the member States through which the community interests of States may be expressed."[31] This does not, by any means, imply that the General Assembly is "democratic" in the true meaning of the word[32]; but in a world still legally based on sovereignty,[33] "the only principal organ (art. 7(1)) of the U.N. in which all member States are represented"[34] is seen as more "legitimate" than the Security Council in such a way that "[o]bviously, GA declarations convey strong indications of elements of the international *ordre public*."[35] All the more so that, as very aptly shown by Nolte in his excellent presentation of Article 2(7),[36] this provision, which "was intended to strengthen the protection of States against incursions into their domestic affairs . . . has been increasingly eroded and emptied of substance."[37] "This shift does, however, not simply amount to a greater restriction of sovereign equality of States. Rather, it involves an increase in importance of the 'second pillar' of sovereign equality, namely the rights of participation in the international community."[38]

After a brief period during which the so-called "automatic majority"[39] favored the interests of the West, a coalition of the communist countries and of the nascent Third World used the Assembly as a tool to challenge the existing international order.

As a first step, it was used in order to fight colonialism. It would be an exaggeration to uphold that decolonization was a consequence of this fight—the move towards liberation of colonized people had already widely started when the General Assembly adopted the celebrated Dec-

30. Siegfried Magiera, *Article 9*, *in* CHARTER COMMENTARY, *supra* note 8, at 248; *see also* Hailbronner & Klein, *supra* note 29, at 258.

31. Ress, *supra* note 3, at 16.

32. Democracy is based on the one person-one vote principle; it can hardly be transposed to an assembly of sovereign states, many of which cannot themselves be seen as democratic by any decent standard.

33. See Bardo Fassbender & Albert Bleckman, *Article 2(1)*, *in* CHARTER COMMENTARY, *supra* note 8, at 68, for a rather theoretical, but extremely stimulating, commentary on the notion of sovereignty.

34. Magiera, *supra* note 30, at 248.

35. Hailbronner & Klein, *supra* note 29, at 270.

36. *Compare* Georg Nolte, *Article 2(7)*, *in* CHARTER COMMENTARY, *supra* note 8, at 148, *with* Felix Ermacora, *Article 2(7)*, *in* CHARTER COMMENTARY 1ST ED., *supra* note 2, at 139 (two very different commentaries of the same provision).

37. Nolte, *supra* note 36, at 171.

38. Fassbender & Bleckman, *supra* note 33, at 89.

39. This expression was forged in order to revile the "coalition" of the Third World and the communist block in the 1960s. In fact, it was just the symptom of common interests. Moreover, before 1960, the reverse was true and the East was usually isolated in the votes in the General Assembly.

laration on the Granting of Independence to Colonial Countries and Peoples in 1960,[40] to which, curiously enough, Fastenrath does not really give fairness.[41] However, there can be no doubt that, by interpreting widely Article 73 of the *Charter*, by exercising continuous institutional pressure on the colonial powers and, above all, by promoting an anti-colonial interpretation of the right of peoples to self-determination,[42] the General Assembly greatly contributed to accelerating and strengthening the trend towards decolonization.

In turn decolonization led to an impressive change and widening in the composition of the General Assembly itself which induced a new focus on the issues linked to the development of less developed countries. While of course not ignored, this aspect is probably played down in Simma's *Commentary*. Indeed, Wolfrum mentions that "[t]he word 'development' . . . has become a keyword in the practice of the U.N." and devotes two paragraphs to the dead-born "new international economic order" (NIEO).[43] But, except a mention to the notion of sustainable development "added" by the U.N. Rio Conference on Environment and Development of 1992, he does not analyze in depth neither the concept nor the reasons of the failure of the NIEO and just mentions in passing that "[s]ince its 53rd session [1998], the GA dealt with the problem how globalization and interdependence may bring about economic development."[44] For their part, Hailbronner and Klein, in their evaluation of the role of the General Assembly, describe its evolution until the 1970s by distinguishing, as I have made above, between a first phase characterized by the General Assembly assuming an auxiliary function in the maintenance of peace, a second "decolonization phase" and a third one where "the GA has increasingly dealt with the revision of the world economic system."[45] However, they do not deal with the actual situation nor do they analyze the impact of "[t]he dramatic political changes in the 1990s."[46] It is only in relation with the U.N. Economic and Social Council (ECOSOC) that Lagoni and Landwehr rightly stress that "there is a need

40. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960).

41. What has been called the "Charter of Decolonization" is just mentioned twice in passing in the (rather brief) commentary of Article 73 and its far-reaching scope is not underscored. *See* Fastenrath, *supra* note 26, at 1092–93.

42. An interpretation which was far from self-evident in view of both the *travaux préparatoires* of the Charter and the text of Article 73 (especially if compared with that of Article 76).

43. Rüdlger Wolfrum, *Article 55(a) & (b)*, *in* CHARTER COMMENTARY, *supra* note 8, at 901.

44. *Id.* at 907. However, it is fair to point out that Fassbender and Bleckmann analyze "Sovereign Equality in an Age of Globalization" in their commentary of Article 2(1). Fassbender & Bleckmann, *supra* note 33, at 89–90.

45. Hailbronner & Klein, *supra* note 29, at 275.

46. *Id.*

for global (institutional) solutions to global socio-economic problems," but without elaborating anymore.[47] One could legitimately ask whether the General Assembly has become "jobless" in the present period. Indeed, it continues adopting streams of resolutions on the most various topics. But their quantity hardly hides their limited meaning and scope: either the scope and purposes of the *Charter* as interpreted by the majority have been reached (e.g., decolonization), or are out of reach since the real debates take place elsewhere (e.g., economic matters,[48] peace and security[49]), or are so controversial that a consensus on significant progresses is highly improbable. This is the case, in particular, in the field of human rights. As shown by Riedel in his crystal-clear presentation of Article 55(c), the "programme" indicated by this provision has been largely fulfilled, at least on paper, with the adoption of the Bill of Rights (Universal Declaration on Human Rights plus the two 1966 Covenants) and "numerous U.N. resolutions, declarations and special human rights treaties."[50] However, "a truly effective implementation of universally guaranteed human rights standards is still lacking," and does not seem attainable in the foreseeable future,[51] when the sessions of the Human Rights Committee appear more and more as a mockery.

Similarly, after the quasi-completion of the decolonization process, the right of peoples to self-determination is anew an empty shell.[52] In his "transversal" presentation, Doehring makes his best to give it a significant meaning by including "internal self-determination" in the concept.[53] However, it must be recognized that such an interpretation is more within the sphere of wishful thinking than accepted as a positive legal norm by a majority of U.N. Members even if the 1992 Declaration on

47. Rainier Lagoni & Oliver Landwehr, *Article 62*, *in* CHARTER COMMENTARY, *supra* note 8, at 1001.

48. Dealt with in the IMF, the World Bank and the WTO and, even more predominantly, within the private transnational sphere.

49. Dealt with in the Security Council and, much more predominantly, outside the U.N. by individual states. *See infra* pp. 137–40, 145–49.

50. Eibe Riedel, *Article 55(c)*, *in* CHARTER COMMENTARY, *supra* note 8, at 917–41.

51. *Id.* at 940.

52. Curiously enough, Doehring asserts that "the practice of the [International Court of Justice] offers very few contributions to the interpretation of Art. 1(2) of the U.N. Charter." Karl Doehring, *Self-Determination*, *in* CHARTER COMMENTARY, *supra* note 8, at 55. This is not my opinion: the Court has greatly contributed to fixing the anti-colonial interpretation of the principle of self-determination of peoples. *See* Legal Consequences for States of the Continued Presence of South Africa in Nambia (South West Africa) Notwithstanding Security Counsel Resolution 276 (1970), 1971 I.C.J. 16 (June 21); Western Sahara, 1975 I.C.J. 12 (Oct. 16); East Timor (Port. v. Austl.), 1995 I.C.J. 90 (June 30); *see also Doehring*, *supra*, at 54–55 (Doehring rightly mentions all these decisions in his discussion).

53. Doehring, *supra* note 52, at 56–57. I share Doehring's view. *See e.g.*, Alain Pellet, *Quel avenir pour le droit des peuples à disposer d'eux-mêmes?*, *in* JIMENEZ DE ARECHAGA LIBER AMICORUM 255 (Manuel Rama-Montaldo ed., 1994).

the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities can be seen as a step in the good direction.[54] Similarly, it is certainly acceptable that "a right of secession could . . . be recognized if the minority discriminated against is exposed to actions by the sovereign State power which consist in an evident and brutal violation of fundamental human rights"; but, here again, this is more a doctrinal view than a reflection of a position taken by the General Assembly.[55]

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This being said, according to the *Charter*, the General Assembly is not without competence in the field of international peace and security, the first and main purpose of the United Nations. As explained by Hailbronner and Klein, "the GA may take 'effective collective measures' as stated in Art. 1(1), including the recommendation of collective measures" and such a power "was not first given to [it] through the Uniting for Peace Resolution, but rather can be said to belong to the GA by virtue of the spirit of the Charter itself."[56] Indeed, Article 14 does not permit the General Assembly to undertake "intrusions" into the Security Council's peculiar sphere,[57] nor does the *Charter* give it any right to decide enforcement action by contrast with the powers belonging to the Council by virtue of Chapter VII, although it can be sustained that it could authorize such an action.[58]

These possibilities, combined with the "dilution" of Article 12, should have encouraged the General Assembly to at least make recommendations and take positions on situations threatening or breaching the international peace.[59] It has done so abundantly during the Cold War and again recently in some cases,[60] and, in Resolution 47/120 B, it resolved "to make full and effective use of the functions and powers set out in Articles 10 and 14 of the Charter."[61] However, as noted by Kimminich

54. G.A. Res. 47/135, U.N. GAOR 3d Comm., 47th Sess., U.N. Doc. A/RES/47/135 (1992).

55. Doehring, *supra* note 52, at 58.

56. Hailbronner & Klein, *supra* note 29, at 266.

57. *See* Otto Kimminich & Markus Zöckler, *Article 14*, *in* CHARTER COMMENTARY, *supra* note 8, at 321.

58. *See* Frowein & Krisch, *supra* note 10, at 707 (the authors do not take a firm view in this respect).

59. Hailbronner & Klein, *supra* note 29, at 295.

60. Notably regarding the situation in Kosovo. *See Situation of Human Rights in Kosovo*, G.A. Res. 53/164, U.N. GAOR 3d Comm., 53d Sess., Agenda Item 110(c), U.N. Doc. A/RES/53/164 (1999); *Situation of Human Rights in Kosovo*, G.A. Res. 54/183, U.N. GAOR 3d Comm., 54th Sess., Agenda Item 116(c), U.N. Doc. A/RES/54/183 (2000).

61. G.A. Res. 47/120, U.N. GAOR, 47th Sess., at 41, U.N. Doc. A/47/49 (1992).

and Zöckler, this "remarkable statement . . . has not been followed by determined activities" in spite of the Secretary-General's encouragements.[62]

An outstanding example of this timorousness can be found in the remarkable abstention of the General Assembly to condemn—or, at least, address—the U.S. and U.K. armed attack against Iraq in spite of the wide condemnation of this action around the world and by an overwhelming majority of States.

This reserve of the world forum, supposedly the "conscience" of the international community, on a situation so clearly "resulting from a violation of the provisions of the . . . Charter setting forth the Purposes and Principles of the United Nations,"[63] is but an illustration of the new state of international relations characterized not only by a weakening of the General Assembly but, more generally of the U.N., including the Security Council—theoretically vested with "primary responsibility for the maintenance of international peace and security."[64]

This being said, there can be no doubt that, in the past, the General Assembly has proved able to make use of its powers rather expansively and a burst of energy cannot be excluded if the Third World finds new energy rather than continuing to be systematically kept out of world affairs. Such a reawakening is even less foreseeable with respect to the Security Council. I share the view of Hailbronner and Klein who state, "[t]he [relative] expansive use the GA has made of its powers is certainly less troubling than the [Security Council's] inability to assert its leading role."[65] This is apparent both regarding role of the Security Council in the pacific settlement of disputes (Chapter VI) and with its supposed action with respect to threats to the peace, breaches of the peace and acts of aggression (Chapter VII).

It must, however, be stressed right away that "[r]ecent [Security Council] practice . . . has to some degree blurred [the] line of separation" between both Chapters.[66] As shown by Frowein and Krisch, during the last decade, the Council has exceeded the confines of its power to take binding measures as fixed when the *Charter* was adopted and then limited to the measures under Chapter VII. This has been particularly the case during the second Gulf war (after the aggression of Iraq against Kuwait), or at the occasions of the Bosnian war or of the Kosovo con-

62. *See* Kimminich & Zöckler, *supra* note 57, at 325.
63. U.N. CHARTER art. 14.
64. Just Delbrück, *Article 24*, *in* CHARTER COMMENTARY, *supra* note 8, at 442.
65. Hailbronner & Klein, *supra* note 29, at 287.
66. Frowein & Krisch, *supra* note 10, at 721.

flict.[67] However, such an extensive interpretation of the Security Council's powers can be accepted to the extent that they are related to its "primary responsibility" for the maintenance of international peace and security on the basis of the doctrine of implied powers.[68]

If one looks first at the dispute settlement, it is apparent that "the [Security Council] achieved only modest results in implementing Art. 33(2) and more generally within the entire framework of Chapter VI."[69] In this respect, I would suggest that the record of the Secretary-General as a mediator (*lato sensu*) is probably more impressive (although largely passed over silence in the book). As for the International Court of Justice (ICJ), a succinct but dense and stimulating general presentation of which is made by Mosler and Oellers-Frahm,[70] it has certainly contributed as much as it could to the peaceful settlement of disputes given its status and the strictly consensual basis of its jurisdiction, a trait which should not disappear in a foreseeable future. It is, however, questionable whether it will succeed in facing the increasing quest of states for legal resolution of disputes if it does not reform in depth its procedure and methods of work.

Regarding action for the maintenance of international peace and security, the role of the Security Council remains crucial. Its poor record in this vital matter is a source of deep concern since it endangers the whole system imagined at the end of World War II and the recent events are anything but reassuring in this regard.

As is well known, the U.N. system is based on three pillars: the peaceful settlement of disputes, the prohibition of the threat or use of force in international relations, and collective security, the last two being tightly linked, but distinct. This particular feature is well brought to light by Randelzhofer, the commentator of both Article 2(4) and Article 51, who emphasizes that these provisions "do not exactly correspond to one another in scope, i.e. not every use of force contrary to Art. 2(4) may be responded to with armed self-defence."[71] This is possible only inasmuch an "armed attack"[72] *has* occurred: as rightly and clearly emphasized by

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67. *Id.* at 706. The same can be said in respect of the "quasi-judicial" or "quasi-legislative" functions taken up by the Security Council. *Id.* at 708.

68. On this notion, see Ress, *supra* note 3, at 31.

69. Christian Tomuschat, *Article 33*, *in* CHARTER COMMENTARY, *supra* note 8, at 594.

70. Hermann Mosler & Oellers-Frahm, *Article 92*, *in* CHARTER COMMENTARY, *supra* note 8, at 1139.

71. Randelzhofer, *supra* note 10, at 790.

72. The French text of Article 51 uses the expression "*agression armée*," a phrase which might imply a more massive and "governmental" use of force than an "armed attack." This difference in wording might partly explain why French-speaking authors had more difficulties than their Anglophone counterparts to accept that the "armed attack" against the World Trade Center and the Pentagon on September 11, 2001, clearly met the requirements of Article

Randelzhofer the so-called "anticipatory self-defence" is incompatible with Article 51.[73]

As the ICJ put it in *Nicaragua*, "under international law in force today—whether customary international law or that of the United Nations system—States do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack.'"[74] This also holds true for "individual" responses. In such cases, armed reprisals are—supposedly—strictly prohibited and only collective security measures must come into play.

This of course presupposes that the finding of a breach of the principle of the prohibition of the threat or use of force and its determination be made through a collective process. This is the object of Article 39 of the *Charter*, which entrusts the Security Council with this task while Articles 40 to 42 give it the responsibility to draw consequences from its finding by recommending or deciding the measures which ought to be taken. In so doing, the Council is vested with a large measure of discretionary power, only "subject to very few express [or, indeed, implicit] limitations,"[75] deriving from (1) the purposes and principles of the U.N. embodied in Articles 1 and 2 of the *Charter* itself; (2) *jus cogens*; and (3) the general principle of proportionality.[76]

It must be noted in this respect that while the Security Council has rarely found that a state was responsible for an act of aggression or a breach to the peace,[77] it has broadly interpreted the notion of a "threat to the peace," going as far as to designating as such ongoing conflicts.[78] Under this broad definition, it has also included under the general denomination of "threats to the peace": internal conflicts, violations of human rights and humanitarian law, violations of democratic principles, and the proliferation of weapons of mass destruction.[79]

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51. Another discrepancy between the English and the French texts can be found in Article 24 in which the English "primary responsibility" corresponds to the French "*responsabilité principale*" "which appears to imply a lesser sense of priority." Jost Delbrück, *Article 24*, *in* CHARTER COMMENTARY, *supra* note 8, at 442, 446.

73. Randelzhofer, *supra* note 10, at 803.

74. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 110, ¶ 211 (June 27). I cannot agree with Randelzhofer who, basing his view on the *travaux préparatoires* of Resolution 3314 (XXIX) of December 14, 1974 defining aggression, maintains that "[t]he notions of 'armed attack' ('*agression armée*') and 'act of aggression' ('*acte d'agression*') do not coincide." *Randelzhofer*, *supra* note 10, at 795. The mere reading of Articles 39 and 51 in light of the title of Chapter VII pleads for the opposite interpretation.

75. Frowein & Krisch, *supra* note 10, at 705.

76. *Id.* at 710–12.

77. *See id.* at 721–22.

78. *Id.* at 722–23. Resolution 1368 on the armed attack against the World Trade Center and the Pentagon goes as far as designating this single pattern of acts as a threat to the peace *and* an act of aggression (implicitly accepting that the U.S. was acting under self-defense).

79. Frowein & Krisch, *supra* note 10, at 723–26.

This last category might prove of great importance in the future insofar as the U.S. relinquishes its "cowboy-like" policy and returns to the bosom of the United Nations in conformity with its commitments under the *Charter*.

In reality, the determination chosen by the Security Council under Article 39 is of little significance since, whatever it is, the same range of measures can be recommended (e.g., Article 40) or decided (e.g., Articles 41 and 42). Only self-defense under Article 51 is conditioned by the existence of an armed attack, which can be determined provisionally by the victim itself.

This being said, the whole mechanism is far from being satisfactory. Not only can the Security Council be paralyzed by the veto (and often is),[80] but also, more often than not, the U.N. lacks the concrete means of handling the matter properly. The recent incapacity of the U.N. to face efficiently the civil war raging in Liberia has again shown it tragically; the same has been (or is) true in many other conflicts.[81]

Agreements under Article 43 have not been concluded and the U.N. has no military force of its own.[82] It is therefore entirely dependent on the good will of its members to carry out its functions in the field of the maintenance or reestablishment of peace. This is not incompatible with the *Charter*—Article 42 provides for "operations by . . . forces *of Members of the United Nations*"—but it is a source of uncertainties and slowness.[83] In order to partly overcome this highly unsatisfactory situation, the U.N. has established new and imaginative mechanisms, such as the now irreplaceable peacekeeping operations, "so as to compensate the functional disability of the [Security Council]."[84]

According to Bothe, who presents them comprehensively in forty descriptive but most useful pages, preceded with a ten page "select bibliography," these very diverse operations "differ considerably from original conceptions concerning the maintenance of international peace and security."[85] However, they concur with the accomplishment of the

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80. Or by the "reverse veto" on this notion. *See id.* at 714.

81. Such as in Somalia (after the tragic failure of operation "Restore Hope"), Bosnia and Herzegovina, Rwanda, or Sierra Leone, just to take some recent examples among the most striking and unfortunate.

82. *But see* Frowein & Krisch, *supra* note 10, at 763 ("stand-by arrangements" with 87 member states for the deployment of military forces in the framework of peace-keeping operations and common brigade for rapid deployment under unified command established by several States).

83. U.N. CHARTER art. 42 (emphasis added).

84. Ress, *supra* note 3, at 17.

85. Michael Bothe, *Peace-Keeping*, *in* CHARTER COMMENTARY, *supra* note 8, at 660. See, in particular, the remarkably concise and helpful notes on each of the 43 operations created up to the publication of the Commentary. *Id.*

main mission of the U.N. and doubts on their legality are out of place. This is also true concerning the enforcement actions which, more and more often, are "not entrusted to . . . genuine U.N. military operation[s] but rather to . . . specific groups of States,"[86] the legality of which is hardly debatable.[87]

There can be no doubt that, failing the effective implementation of the enforcement mechanism imagined in San Francisco fifty-eight years ago, those substitutes are better than no mechanism at all. It is commonplace, however, to note that they are seriously inadequate and have not proved able to avoid or to stop countless conflicts of all kinds, thus leaving room to unilateralism in the name of what Fassbender and Bleckmann name "the untamed side of sovereignty."[88]

Whether as a result or as a cause of this most unfortunate situation, there still exists a strong tendency among states to use force in order to make good their (alleged) rights—even without them being victims of an illegal use of force—in flagrant violation of Article 2(4) of the *Charter*, as well as of the law of state responsibility.[89]

It can be noted in this respect that the "interplay between the system of collective security and the régime of State responsibility"[90] points both ways: breaches by states of their obligations under the *Charter* entail their international responsibility and the implementation of such obligations can be made through the law of state responsibility, in particular, by recourse to counter-measures.[91] However, the determination of a breach by the Security Council "does not justify reactions that would otherwise be unlawful, and, therefore, does not expand the scope of the admissible use of force either."[92] Yet, in numerous cases, states have in-

86. *Id.* at 664. *See also id.*, at 698–700 (enumerating and describing "armed forces created *ad hoc* by a group of States" and the "multinational forces . . . established under a mandate given by the [Security Council]").

87. See the solidly argued, albeit prudent, demonstration of "the constitutionality of decentralized implementation" by Frowein and Krisch. *Frowein & Krisch*, *supra* note 10, at 756–58.

88. Fassbender & Bleckmann, *supra* note 46, at 90.

89. *See Responsibility of States for Internationally Wrongful Acts: Report of the International Law Commission*, U.N. GAOR, 56th Sess., Supp. No. 10, at 57, U.N. Doc. A/56/10 (2001). Curiously, these Articles, which are one of the most striking achievements of the I.L.C., are not mentioned in Fleischhauer's most documented commentary of Article 13, which includes a general review of the work of the I.L.C. Carl-August Fleishhauer, *Article 13*, *in* CHARTER COMMENTARY, *supra* note 8, at 299–317.

90. Frowein & Krisch, *supra* note 10, at 714.

91. On the other hand, it must be stressed that, "the system of collective security in the U.N. is not conceived as a reaction to a violation of international law, but as a preventive tool to ensure the maintenance of peace." *Id.* at 721.

92. *Id.* at 714.

voked a finding by the Council under Article 39 of the *Charter* to justify unilateral military "sanctions."[93]

The same holds true *a fortiori* when the Security Council has not made any determination under Article 39. In such a case, with the exception of self-defense within the limits of Article 51, the use of military force is strictly, completely, and absolutely, prohibited by the *Charter*. Such a prohibition includes the so-called "humanitarian intervention" which Randelzhofer firmly and rightly condemns in unambiguous terms as a conclusion of a rigorous argumentation: "[u]nder the U.N. Charter, forcible humanitarian intervention can no longer . . . be considered lawful."[94]

However, in many cases, if the Security Council remains silent or does not take effective measures in response to inhumane situations:

> [T]here is a split between morality and law. It becomes more and more intolerable to see grave violations of human rights within a State and to see other States being banned by public international law to intervene. If the [Security Council] does not act on the basis of Arts. 39 and 42 to stop the violations of humanitarian law . . . States will be tempted to intervene more and more often. Thus, eventually a rule of customary international law might develop, making humanitarian intervention lawful. It would be preferable that the practice of the [Security Council] makes the development of such a rule unnecessary.[95]

In a famous article published in 1970, Professor Thomas M. Franck asked, "who killed Article 2(4)?"[96] At the time, Professor Louis Henkin answered that, "the reports on the death of Article 2(4) are greatly exaggerated."[97] Randelzofer, who echoes the debate, subscribes to the second view.[98] So do I.

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93. In such a situation, non-military measures are acceptable. *See Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *in* Report of the International Law Commission on the Work of Its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), *available at* http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfrah.htm (last visited Nov. 15, 2003).

94. Albrecht Randelhzhofer, *Use of Force*, *in* CHARTER COMMENTARY, *supra* note 8, at 131. Randelhzhofer also concludes, "[a]s a consequence military actions taken by NATO forces against Yugoslavia . . . were not compatible with public international law." *Id. C.f.* Alain Pellet, *'La guerre du Kosovo'—Le fait rattrapé par le droit*, INT'L L.F., 160, 165 (my opinion is more qualified on this case).

95. Randelzhofer, *supra* note 94, at 132.

96. Thomas M. Franck, *Who Killed Article 2(4)? or: The Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 809 (1970).

97. Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544 (1971).

98. *See* Randelhzhofer, *supra* note 94, at 136.

It must be admitted, however, that, if Article 2(4) has not yet been murdered, the U.S. is trying hard.[99] If the present situation endures, it will succeed in its undertaking.

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The reading notes included here give but a pale idea of the richness of Simma's *Commentary*. I have focused on the delicate legal and political issues. But it would be unfair not to mention the care given to less crucial Articles. Not all can be cited, but some deserve a special mention. This is so, in particular, for the remarkable presentations of Articles 52 and 54 (Hummer and Schweitzer), 53 (Ress and Bröhmer), 100 (Schreuer and Ebner), 101 (Göttelmann and Münch), 102 (Knapp and Martens), 104 (Seidl-Hohenveldern and Rudolph), and 108 and 109 (Karl, Müzelburg and Witschel). It is also worth noting the exceptionally complete and careful presentation of all the Articles concerning procedural issues in the General Assembly, the Security Council or the Economic and Social Council (ECSOC)—this might be a special trait of German "genius" . . .

All these commentaries concur to making the book not only a stimulating introduction to the crucial international issues of the present time but also an essential working tool for whoever "practices" the United Nations. Its usefulness is enhanced by numerous helpful tables,[100] and by the precious table of cases and general index (even if the absence of an index of the treaties and resolutions cited is to be regretted).

In the preface, Professor, now Judge, Bruno Simma writes:

> [I]t is submitted that faithful stock-taking of more than half a century of U.N. practice and, more importantly, the constant checking of this practice against the purposes and principles of the United Nations Charter with a view to providing guidance for future activities of the Organization and its member States, becomes more worthwhile than ever.[101]

The editor of the commentary and his impressive team of authors have brightly fulfilled their part of the task. It is to be hoped that the organization and its member states will in turn play their card. The

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99. And others as well. However, as the sole superpower, the U.S. bears a special responsibility. A country cannot claim world leadership and, at the same time, claim irresponsibility and leniency. All States are equal; some are "more equal" than others; the U.S. is the "most equal" of all.

100. *See e.g.*, CHARTER COMMENTARY, *supra* note 8, at 361–62 (General Assembly voting records); 391–98 (sessions); 433–36, 548–49 (lists of the subsidiary organs of the General Assembly and Security Council); 1045–47 (special procedures in the field of human rights).

101. *Id.* at vii.

international political context is not a source of great optimism in this respect—but works like Simma's *Commentary* could help to reverse the unfortunate trend we are witnessing.