The Future of the Charter of the United Nations

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Introduction

The United Nations Charter has weathered many storms during and after the Cold War leading to the question of the secret of its success as well as speculation on its future. The Charter entered into force on 24 October 1945, upon the required ratification by the five Great Powers and the majority of the other states which had signed the Charter in San Francisco on 26 June 1945.[1]

The UN Charter is a relatively short treaty of less than 9,000 words. By comparison, the draft Constitution for Europe is almost 155,000 words long.[2] To some extent the secret of the UN Charter's survival has depended on its concise character. An abundance of detail would undoubtedly have failed the test of time. In addition, the formulations of the Charter itself are obviously also responsible for its success. They are of a fairly general nature, but were carefully chosen, albeit sometimes deliberately ambiguous because of the character of compromise. In a number of fields this has created room for additional and dynamic interpretations in the light of new needs and changing circumstances.[3] Moreover, all Member States, of course, shared the conviction that they would be better off with an organization of nations than with none. This has also protected the Charter. So far, none of the Member States has ever really wanted to turn its back on the organization. Only one country has ever withdrawn its membership: Indonesia, under President Sukarno, although it subsequently returned.[4] Admittedly American ambassadors have sometimes been less than complimentary: one

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1 See Charter of the United Nations, always reprinted in the newest Volume of the Yearbook of the United Nations. Available also at: <http://www.un.org/aboutun/charter/index.html>; Article 110, para. 3. On 24 October 1945, the five permanent powers and another 24 of the 50 original signatory states had ratified the Charter.

2 Treaty establishing a Constitution for Europe, Rome, 29 October 2004, O.J. (C 310), 1 (16/12/2004), available at: <europa.eu.int/constitution/index_en.htm>.

3 The conventional rules of treaty interpretation are recorded in arts 31-32 of the Vienna Convention on the Law of Treaties (1969), UNTS Vol. 1155 No. 18232, *ILM* 8 (1969), 679 et seq. The principal rule is that treaty provisions "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", article 31, para. 1.

4 Indonesia left the UN in 1965, but resumed its membership in 1966. See *UNYB* 1966, 207-208.

called the United Nations *A Dangerous Place* (Moynihan, 1978),[5] while another said that no one would notice if it lost ten storeys (Bolton, 2004), but nevertheless all the 192 nations are clearly united in a desire that the organization should continue to exist. This in itself is unique in the history of the world.

The first part of this article looks briefly at the creation of the UN Charter and discusses its legal nature. It then examines seven main differences between the United Nations of 1945 and the United Nations at the start of the 21st century. The third part reviews a number of instances of additional and dynamic interpretation of the Charter in the light of these changed circumstances and new needs, all of which could be effected without formal amendment. The fourth part draws up the balance of the agenda for Charter reform at the World Summit held in September 2005 on the occasion of the sixtieth anniversary. According to Kofi Annan, this was *the* chance for UN structural reform, an opportunity which arises only once every generation. Was this opportunity taken? And finally: what is the future of the Charter of the United Nations in the 21st century?

I. The Creation and the Legal Nature of the Charter

1. Creation

The UN Charter is the successor of the Covenant of the League of Nations, which collapsed together with the League of Nations as a result of World War II. Some important lessons that were learned as a result of the failure of the League of Nations were that the organization should be more than an instrument to merely protect the *status quo* and the territorial integrity of independent states. It should also be concerned with promoting social justice. This broader aim, *inter alia*, of ensuring "freedom from want" had already emerged in 1941 in Roosevelt's "Four Freedoms" speech and Roosevelt's and Churchill's Atlantic Charter.[6] The second lesson of the failure of the Members of the League

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5 D.P. Moynihan, *The United Nations: A Dangerous Place,* 1978. See also W.F. Buckley, Jr., *United Nations Journal. A Delegate's Odyssey*, 1974, and M. Finger, *American Ambassadors at the UN: People, Politics, and Bureaucracy in Making Foreign Policy*, 1988.

6 State of the Union address before the American Congress by President Franklin D. Roosevelt, 6 January 1941. Source: F.D. Roosevelt, *Develop-*

of Nations was that it was necessary to break down the system of decision making with unanimous votes, which meant that in the League of Nations every state actually had a right of veto.[7] The third lesson was that the organization should be created with supranational competences that could take decisions binding all the members.[8]

Fifty states participated in the founding conference of the United Nations in San Francisco from April to June 1945.[9] There was a good atmosphere amongst the 300 government representatives, but there were still difficult problems to be resolved on many issues. This is apparent from the reports and documents of this conference, which still constitute a wealth of research material.[10] No fewer than 1,500 amendments were submitted.

The draft Charter was accepted on 26 June 1945 without too many changes.[11] The whole package, with the original document and all the fifty signatures was flown over to the depositary of the new treaty, the

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ment of United States Foreign Policy: Addresses and Messages of Franklin D. Roosevelt, 1943, 81-87. See also Atlantic Charter, 14 August 1941, ibid., 112-113: "… they desire to bring about the fullest collaboration between all nations in the economic field with the objective of securing, for all, improved labor standards, economic advancement and social security".

7 See article 5, para. 1 of the Covenant of the League of Nations, requiring in principle that "… decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting", Covenant of the League of Nations, 28 June 1919, available at: <http://www.yale.edu/lawweb/avalon/leagcov.htm13>; AJILs 128, 112 BFSP 13.

8 See F.S. Northedge, *The League of Nations: Its Life and Times 1920-1946*, 1988.

9 As a result of serious disagreement between the United States and the Soviet Union on a new Polish Government the Polish delegation never arrived in San Francisco and some of its members were imprisoned during their stop-over in Moscow. However, Poland was later allowed to sign the Charter and to be viewed as an original member by which the number of original members became 51. See R.B. Russell/ J.E. Muther, *A History of The United Nations Charter: The Role of the United States 1940-45*, 1958, 929.

10 See United Nations, *Documents of the United Nations Conference on International Organization*, the so-called UNCIO Documents, 22 Vols.

11 On the concerted diplomacy towards this end see S.C. Schlesinger, *Act of Creation. The Founding of the United Nations. A Story of Superpowers, Secret Agents, Wartime Allies and Enemies, and Their Quest for a Peaceful World*, 2003.

host and American President Truman. Alger Hiss, the young Secretary-General of the San Francisco conference, described for an oral history project how this was done with a small military aircraft, and how he had decided, after some hesitation, to attach the only parachute on board to the package containing the Charter, and not to himself, because he had been so conscious of the special mission entrusted to him, to take this precious document to the vaults of the White House.[12]

2. Legal Nature

As a treaty, the Charter with its 111 articles has a hybrid character. It is *contractual* with regard to its provisions on signing, amendments, ratification and entry into force.[13] It is *normative* with regard to its provisions on aims and principles.[14] It is *constitutive* with regard to its provisions on membership and the organization of the United Nations with its six principal organs, establishing the composition, functions and powers, and their voting procedures.[15] The Charter should primarily be interpreted objectively, in accordance with the meaning of the terms of the treaty based on the normal use of language. However, the most innovative aspect must be the possibility of following a teleological method of interpretation for the provisions of the Charter, in which in particular the broad normative provisions of the Charter are interpreted in such a way that the aim of the treaty is most fully achieved.

If there are two or more possible methods of interpretation, the one to be chosen is that which best serves the aim of the treaty: this is also known as the rule of effectiveness (*effet utile*).[16] The doctrine of *implied*

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12 See J.E. Krasno, "The Founding of the United Nations: An Evolutionary Process", in: J.E. Krasno (ed.), *The United Nations. Confronting the Challenges of a Global Society*, 2004, 42.

13 See Arts 108-110 UN Charter.

14 See the preamble and Arts 1-2 but also Article 55 and Arts 73-74 and 76 UN Charter.

15 E.g. see Arts 3-32 UN Charter.

16 See on this interpretation method G. Berlia, "Contribution à l'interprétation des traits", *RdC* 114 (1965-I), 306 et seq.; H. Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989 (Part Three)", *BYIL* 62 (1991), 1 et seq. (44); C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2005, 45.

powers is also part of this method of interpretation.[17] The Organization must have all the competences which are necessary for the proper execution of the main functions, whether these are explicitly or merely implicitly formulated. One example is the establishment of peace-keeping operations (blue helmets), which had not been explicitly anticipated. Professor Georg Ress distinguished the dynamic-evolutionary method in addition to the teleological method, providing a useful handle for the interpretation of such an important treaty which has been effective for so long and covers so many subjects.[18] The starting point of this method is that it is logical for the Charter to evolve over time, and also that this can change the meaning of the provisions. One clear example concerns the provisions of the Charter on territories whose peoples have not yet attained a full measure of self-government.[19] These are no longer used, and have even lost their legitimacy because new legal instruments have raised the self-determination of nations from a principle to a right.[20] In 1960 this development culminated in the important Decolonisation Declaration.[21] Since 1971 the International Court of Justice (ICJ) has recognised the authority of this dynamic-evolutionary method of interpretation.[22] Obviously, this may well lead to uncer-

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17 See H.G. Schermers/ N.M. Blokker, *International Institutional Law. Unity within Diversity*, 2003, paras 232-236.

18 See G. Ress, "Interpretation", in: B. Simma (ed.), *The Charter of the United Nations. A Commentary*, 2002, 13 et seq. (23-25).

19 See the Chapters XI-XIII UN Charter.

20 See common article 1 of the International Covenant on Economic, Social and Cultural Rights (1966), A/RES/2200 A (XXI) of 16 December 1966, *ILM* 6 (1967), 360 et seq., and the International Covenant on Civil and Political Rights (1966), A/RES/2200 A (XXI) of 16 December 1966, *ILM* 6 (1967), 368 et seq.: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

21 Declaration on the Granting of Independence to Colonial Countries and Peoples in Accordance with the Charter of the United Nations, A/RES/1514 (XV) of 14 December 1960. See on the law and practice of decolonisation J. Crawford, *The Creation of States in International Law*, 2006, Part III. With the termination of the Trusteeship Agreement for the Trust Territory of the Pacific Islands, and Palau's admission as the 185th Member of the UN in 1994, the Trusteeship Council completed the task entrusted to it under the Charter. The Council now meets as and where required.

22 See the Advisory Opinion on Namibia, in which the ICJ observed: "… an international instrument has to be interpreted and applied within the

tainty as to the content of the law and about how to find and indicate the law. Therefore, the law and the practice of the main political organs of the UN are also extremely important. The Advisory Opinions of the ICJ have also contributed to the clarification and interpretation of existing Charter law as well as to the consolidation of new trends in and to the progressive development of international law. In these Opinions the Court has regularly explored the limits of the competences of the principal organs of the UN, and not infrequently also extended the boundaries somewhat.[23] Recently, the Security Council also appeared to embark on the path of interpreting the law – if not creating law – by making pronouncements in a general sense,[24] i.e. not in the specific situation of a particular conflict, but for example, on the threat to peace as a result of the large-scale violation of human rights, international terrorism or the spread of what has so dramatically but correctly been called "diseases of mass destruction", such as AIDS.[25]

The interaction of all these resolutions, the practice of the political organs of the UN and the judgements and advisory opinions of the ICJ

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framework of the entire legal system prevailing at the time of the interpretation", 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 et seq. (31), para. 53.

23 See on this S. Rosenne, *The Law and Practice of the International Court (1920-2005)*, Vol. II, 2006, 949-1020; and M. Pomerance, "The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms", in: A.S. Muller et al. (eds), *The International Court of Justice: Its future role after Fifty Years*, 1997, 271.

24 See for an early article on this P.C. Szasz, "The Security Council starts legislating", *AJIL* 96 (2002), 901 et seq. See also K.M. Manusama, *The Principle of Legality in the Post-Cold War Practice of the United Nations Security Council,* 2005, and E. de Wet, *The Chapter VII Powers of the United Nations Security Council*, 2004.

25 Cf. address on behalf of the European Union by the Minister of Foreign Affairs of the Kingdom of the Netherlands, H.E. Dr. Bernard Bot, at the 59th Sess. of the General Assembly of the United Nations General Debate (New York), 21 September 2004, available at: <http://www.europa-eu-un.org/articles/en/article_3826_en.htm>. See in this respect also S/RES/1308 (2000) of 17 July 2000, in which the Security Council addressed this topic "Stressing that the HIV/AIDS pandemic, if unchecked, may pose a risk to peace and security" and "Bearing in mind the Council's primary responsibility for the maintenance of international peace and security".

are important sources for the interpretation of the Charter in a contemporary context.[26]

II. The United Nations, Then and Now

Seven points may illustrate the extent to which the current United Nations differs from that in 1945.

1. Universal Membership

In the first place, the organization evolved from a limited to a universal cooperative venture. In 1945 the United Nations was an alliance against Nazism and fascism, an alliance of the victors of World War II. Initially Germany, Japan and Italy were, as former enemy states, not permitted to be members. This was the privilege of "peace loving" states which had accepted the obligations under the Charter and were deemed to be "able and willing to carry out these obligations".[27] Gradually this demand lost its substantive significance and now the Organization aims to achieve universal membership.

2. The End of Colonialism and the Emergence of the North-South Divide

The second major change is the end of colonialism. This radically changed the UN. The number of members almost quadrupled, in a way that had never been anticipated. Not long ago, the New York professor Schachter related how he had been asked to advice on the number of seats which would have to be placed in the hall of the General Assembly building that was being constructed, when he was a young UN official in 1948. He had thought he would allow a generous margin and said: "You can count on a maximum of 75 states."[28] In view of all the

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26 For an early work see R. Higgins, *The Development of International Law Through the Political Organs of the United Nations,* 1963.

27 See Article 4, para. 1 UN Charter.

28 See the interview with Oscar Schachter by Brigitte Sterner, published in *Proceedings of the American Society of International Law 1997,* 1998, 344.

subsequent rebuilding, this proved to be a very expensive miscalculation. However, the qualitative change was even more important than the quantitative change. The process of decolonisation led to very different types of states joining the UN: often poor and vulnerable, and extremely anxious to maintain their newly acquired independence and sovereignty. They sought protection, security and assistance from the UN. The unequal position of developed and developing countries led frequently to debates, if not confrontation on the need for structural reform of the international economic and social order. The cause of the developing countries had a great influence on the development of international law.[29] We now see that several of these countries have become fragile states, sometimes with governments which have lost the monopoly on the use of force, and are no longer able to guarantee the security of their citizens.[30] Obviously, this problem of "failing states" had not been anticipated at all in 1945.

3. From a "Negative" to a "Positive" Concept of Peace

The third change is the drastically different interpretation of the term "threat to peace". In 1945 this referred to maintaining a "negative peace", in the sense of the absence of the threat of war.[31] More attention was soon devoted to "positive peace", a legal order based on the other global values reflected in Article 1, paras 2 to 4. Now there exists a consensus in the United Nations that threats to peace do not only result from wars between and within states, but also from the spread of weapons of mass destruction, international terrorism, transnationally organized crime, infectious diseases, and even – if not yet in the practice of

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29 See the pioneering book by B.V.A. Röling, *International Law in an Expanded World*, 1960.

30 See Advisory Council on International Affairs and Advisory Committee on Questions of Public International Law of the Netherlands Government, *Failing States, A global responsibility*, 2004, No. 35, available at: <http://www.aiv-advice.nl>.

31 J.A. Frowein/ N. Krisch, "Article 39", in: Simma, see note 18, 717 et seq., and P.P. Argent et al., "Article 39", in: J.P. Cot/ A. Pellet/ M. Forteau (eds), *La Charte des Nations Unies. Commentaire article par article,* 2005, 1131 et seq. See also K.C. Wellens, "The UN Security Council and new threats to the peace: back to the future", *Journal of Conflict and Security Law* 8 (2003), 15 et seq.

the Security Council – from serious poverty and underdevelopment and from serious environmental pollution.[32]

4. Human Security as well as State Security

The fourth change is the emergence of the concern for human security in addition to the security of states.[33] In 1945 the concern was to create a system of collective security against aggression by states. In 2006 the threats come both from states and from non-state elements, and these are a threat to the security of both states and people. In fact, the Charter had been ahead of its time in that respect, by already making the link between peace and security, and socio-economic development and a respect for human rights, for example, in Article 55.[34]

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[32] See Note by the President of the Security Council on 31 January 1992, Doc. S/23500, on non-military causes of threats to security. See also the description of "comprehensive security" in Report of the High-level Panel on Threats, Challenges and Change, chaired by Anand Panyarachun, *A More Secure World: Our Shared Responsibility*, Doc. A/59/565 of 2 December 2004, 2 (synopsis). See also Kofi Annan, *In Larger Freedom. Towards Development, Security and Human Rights for All*, Doc. A/59/2005 of 21 March 2005, paras 76-86.

[33] See report "Human Security" by the Commission on Human Security, chaired by Sadako Ogata and Amartya Sen, New York, 1 May 2003; S.N. MacFarlane/ J.F. Khong, *Human Security and the UN. A Critical History*, 2006.

[34] Article 55 UN Charter provides: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
a) higher standards of living, full employment, and conditions of economic and social progress and development;
b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."
Reference could also be made to Article 1, para. 4 UN Charter listing among the purposes of the UN: "to be a centre for harmonizing the actions of nations in the attainment of these common ends."

5. The End of the Cold War

The fifth point concerns the end of the Cold War. This was an important turning point in the history of the UN which created new opportunities for it: the process of independence in Namibia, the end of apartheid in South Africa, peace and reconstruction in Cambodia, Angola and Mozambique and a very clear position against the occupation of Kuwait by Iraq. It also resulted in an increased status of the issue of human rights in international affairs, despite culturally relativist criticism. At the World Conference on Human Rights, human rights were defined as both universal and indivisible.[35] However, it soon became clear that the "honeymoon" period following the Cold War did not cover everything. Long-term regional conflicts, such as that e.g. between Israel and the Palestinians, remained unresolved. Nevertheless, the end of the Cold War was an important turning point for the UN in many different fields.

6. The Impact of September 11th

And then, in the sixth place, there was September 11th 2001. The horrifying terrorist attacks on the United States, and subsequently in Bali, Madrid and London, amongst other places, gave rise to a thorough reconsideration of applicable legal principles in the field of war and peace and on the adequacy of the current arsenal of international regulations to respond to the worldwide threat of international terrorism.[36] Obviously the principles of the Charter are not cut out to serve as a response to attacks on a state by a group of often loosely organized international terrorists. However, following September 11th, new interpretations are being developed, partly on the basis of a new practice in response to situations which have resulted from terrorism, in addition to a series of multilateral and regional anti-terrorism conventions. Major stumbling

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35 Doc. A/CONF. 157/23 of 12 July 1993, para. 5.

36 See on this A. Cassese, "Terrorism is also Disrupting some Crucial Legal Categories of International Law", *EJIL* 12 (2001), 993 et seq.; N.J. Schrijver, "Responding to International Terrorism: Moving the Frontiers of International Law for 'Enduring Freedom'?", *NILR* 48 (2001), 271 et seq., and id., "September 11th and Challenges to International Law", in: J. Boulden/ T.G. Weiss (eds), *Terrorism and the UN: Before and After September 11*, 2004, 55 et seq.

blocks still exist, for example as regards the definition of terrorism, the issue of state terrorism and the political offence exception. However, the determination of the political organs of the UN to take the necessary measures in combating international terrorism is encouraging.[37] Nevertheless, it would be reasonable to expect more from the United Nations with regard to actively and effectively combating international terrorism. In that case, states must allow more room for multilateral, anti-terrorist measures, and should not endlessly take measures unilaterally to extend the right of self-defence.[38] Successfully preventing and combating international terrorism in the long term requires a multifaceted and integrated approach. The UN can provide a good, if not the only forum for this.

7. The UN in a Multi-Actor World

The seventh and last point is that not only the number of members has increased from 51 to 192 states,[39] but that the circle of legal participants has also grown enormously in another respect. Industry, social movements and non-governmental organizations also have a foot in the door, and sometimes even play a role in the UN which had not been anticipated in 1945.[40]

These seven points show that the UN in 2006 is actually very different from that in 1945, and that the organization has revealed a great capacity for adaptation. In the next section some main examples of new interpretations, if not modifications of the Charter itself will be discussed from an international law point of view.

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37 S/RES/1566 (2004) of 8 October 2004. See e.g. the interesting definition of terrorism in para. 3 of this unanimously adopted resolution.

38 R. Wolfrum, "The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is there a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?", *Max Planck UNYB* 7 (2003), 1 et seq.

39 On 28 June 2006, the Republic of Montenegro was admitted as the 192nd Member of the United Nations. See A/RES/60/264.

40 See Report of the Panel of Eminent Persons on United Nations–Civil Society Relations, chaired by Fernando Henrique Cardoso, *We the peoples: civil society, the United Nations and global governance*, Doc. A/58/817 of 11 June 2004. See also T.G. Weiss/ L. Gordenker (eds), *NGO's, the UN and Global Governance*, 1996.

III. Applying, Interpreting and *de facto* Modifying the Charter

Soon after the establishment of the United Nations it became obvious that the Cold War would block any decision-making required to amend the UN Charter. Simultaneously, the envisaged system of collective security could not materialize as a result of the large number of vetoes in the initial years of the United Nations.[41] However, in practice a *modus operandi* evolved to cope with this stalemate. Furthermore, the UN could expand its activities in other fields without any substantive Charter amendment. So far the only amendments of the Charter related to the increase of the size of the Security Council (in 1963, from 11 to 15 members) and the Economic and Social Council (in 1963 from 18 to 27 and in 1971 to 54 members).[42] This section discusses the various ways in which new practices, goals and objectives emerged and adaptations could be made, which constitute dynamic interpretations if not *de facto* modification of the Charter.[43]

1. Voting Procedure in the UN Security Council

Article 27, para. 3 of the UN Charter requires a majority of nine out of 15 votes (before the amendment took effect in 1965 it was seven out of 11) in the Security Council for the adoption of decisions on non-procedural matters, including "the concurring votes of the permanent members." In order to avoid constant paralysis during the Cold War, an early practice emerged that an abstention by one or more permanent members would not block the adoption of a legally valid decision by the Council. In its Namibia Opinion the ICJ rubberstamped this practice "… as not constituting a bar to the adoption of resolutions."[44]

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41 See S.D. Bailey/ S. Daws, *The Procedure of the UN Security Council*, 1998; P. Tavernier, "Article 27", in: Cot/ Pellet/ Forteau, see note 31, 935 et seq., 950-951.

42 See in respect of the Security Council, A/RES/1991A (XVIII) of 17 December 1963, and of the ECOSOC A/RES/1991B (XVIII) of 17 December 1963 and A/RES/2847 (XXVI) of 20 December 1971.

43 See for an early and recently republished work on this R. Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies*, 1968/2005 (reprinted), 180-197.

44 Advisory Opinion on Namibia, see note 22, para. 22.

2. Uniting for Peace Procedure and the Expansion of the General Assembly's Powers

During the Korean crisis in 1950, the Soviet Union pursued a policy of the "empty chair", in reaction to Western refusal to grant the permanent seat on the Council to the newly established People's Republic of China. Only under these circumstances was the Council in a position to take collective action against North Korea, which had been identified as the aggressor and held responsible for a breach of peace.[45] The Korea resolutions were adopted with the then required minimum majority of seven votes in favour. Obviously, Western powers were aware that the absence of the Soviet Union from the Security Council might not last for long. In a political move taking advantage of the presumed non-functioning of the Council the United States and its allies transferred part of the powers of the Council to the Assembly which at the time could more easily be controlled by Western states. Under the appealing title *Uniting for Peace*, the Assembly adopted Resolution 377 (V) on 3 November 1950, by 52 to 5 votes, with 2 abstentions.[46] This Resolution enables the Council on the vote of any seven (from 1965 nine) members or a majority of the members of the General Assembly to call emergency special sessions, should the Council not be in a position to exercise its primary responsibility to address a threat to peace, breach of the peace or act of aggression as a result of lack of unanimity. In the specific cases of a breach of the peace or act of aggression the Assembly even vested itself with the power to recommend the taking of military action. Obviously, such a self-vested power was not in line with the Charter's division of competences between the Council and Assembly as included in Arts 11-14 of the Charter. Not without reason the Soviet Union labelled this particular aspect of the Resolution at the time as "Disuniting for War" rather than "Uniting for Peace".

Employing the Uniting for Peace procedure, the Assembly established in 1956 a peace-keeping operation in the Middle East (UNEF I) being the first UN peace-keeping force.[47] The Assembly did not recommend the use of force as envisaged under the Uniting for Peace Procedure. Moreover, the Assembly did not find a breach of the peace or act of aggression. From 1958 also the Soviet Union appeared to have ac-

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45 S/RES/82 (1950) of 25 June 1950. See also S/RES/83 (1950) of 27 June 1950 and S/RES/84 (1950) of 7 July 1950.

46 See *UNYB* 1950, 193.

47 A/RES/1000 (ES-1) of 5 November 1956.

cepted the procedure and even called on it, albeit not explicitly, when a dead-locked Council could not act during the Arab-Israeli War in 1967.[48]

As a procedure, the Uniting for Peace Resolution has been invoked and applied on numerous occasions, most recently in 2002 in the procedure when the General Assembly sought an Advisory Opinion from the ICJ on the legal consequences of the construction by Israel of a wall in occupied Palestinian territory.[49] As a procedure, the Uniting for Peace procedure appears to have become part and parcel of the institutional law of the United Nations. However, thus far the Assembly has never recommended the use of force under this resolution. One can only speculate on the reasons why the Assembly has shown so much self-restraint in this respect. One explanation could be that the Assembly has been well aware of the fundamental character of the norm of the prohibition to use force in the Charter, including the danger of eroding this norm at a time when international tension is still prevalent. Another reason could well be a policy not to antagonize the majority of the Security Council, if not all of its permanent members. Hence, this particular aspect of the Uniting for Peace Procedure relating to the use of force cannot be deemed a legally valid exercise of the powers of the Assembly and by now it has been well interred in the graveyard of the Cold War. In general terms, through the Uniting for Peace procedure and other relevant practice the functions and powers of the General Assembly have been interpreted in such a manner that the Assembly can also assume responsibility for matters relating to the maintenance of peace and security side by side with the Security Council.

3. Collective Diplomacy and Peacekeeping

The United Nations force as envisaged in the Charter could not be established. Thus the Security Council missed the "teeth with which to bite."[50] But when collective diplomacy did result in a cease-fire there was a need to supervise the implementation of the arrangements in the area of dispute. For this purpose UN peace-keeping operations have

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48 Zacklin, see note 43, 188 fn. 52.

49 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, 136 et seq. (146-152).

50 P. Sands/ P. Klein, *Bowett's Law of International Institutions*, 2001, 53.

been established, initially by the Assembly (e.g. UNEF I)[51] and subsequently mostly by the Council (e.g. Cyprus), and sometimes upon the basis of Chapter VI and sometimes upon the basis of Chapter VII. Hence, the finding that they constitute so-called Chapter VI 1/2 operations.[52] These peace-keeping operations have essentially different tasks and more limited powers than the peace enforcement operations envisaged at the time. The legality of the establishment of UNEF I was later upheld by the ICJ in the Certain Expenses case.[53] Among the reasons given, the Court stated that it was only an enforcement action and not a peace-keeping action that must be referred to the Security Council under Article 11, para. 2 of the Charter.

Despite the lack of an institutional structure and the serious problems in financing, these peace-keeping operations can be viewed as a major success in the actual operation of the United Nations. The presence of an impartial, international element in a conflict situation has often had a stabilizing function, although all too often a definitive solution could not be achieved.[54]

4. The Concept of a Threat to Peace

Without doubt, the primary preoccupation of the United Nations in 1945 was to maintain the "negative peace", i.e. to maintain the *status quo* and to prevent the use of force in international relations. If a state were to prepare an armed attack against another state, the Security Council was to identify this as a "threat to peace" and take mandatory measures under Chapter VII, such as the imposition of a cease-fire and diplomatic measures to prevent an escalation. As a result of interna-

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51 A/RES/1000 (ES-1) of 5 November 1956.

52 United Nations, *The Blue Helmets: A Review of United Nations Peacekeeping*, 1990, 5. See also P.R. Baehr/ L. Gordenker, *The United Nations: Reality and Ideal*, 2005, 92-94.

53 Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, ICJ Reports 1962, 151 et seq.

54 See for proposals to strengthen peace-keeping operations the report of the Panel on United Nations Peace Operations (the so-called Brahimi Report), Doc. A/55/305-S/2000/809 of 21 August 2000, Annex. See also P.F. Diehl, *International Peacekeeping*, 1993; D.S. Sörenson, *The Politics of Peacekeeping in the Post-Cold War Era*, 2005; and M.C. Zwanenburg, *Accountability of Peace Support Operations*, 2005.

tional law developments in the field of human rights and the self-determination of peoples, the Assembly, and somewhat hesitantly the Council as well, came to recognize that a threat to peace can also emanate from a refusal by a state to change a situation deemed to be intolerable, particularly colonial domination, apartheid or foreign occupation. Hence the view took hold that the "negative peace" cannot be maintained in the light of continued flagrant and mass violations of human rights. For this reason the Council labelled, at the time, the situation in Southern Rhodesia and the continued supplying of arms to apartheid South Africa as a threat to peace and ordered coercive measures: in the former case, comprehensive economic sanctions,[55] in the latter, only an arms embargo.[56] The fact that the political organs of the United Nations thus assumed the power to determine that serious violations of human rights constitute a threat to peace can be viewed as one of the most fundamental policy changes within the United Nations system, if not in international relations as a whole. In more recent times, the Council has also determined that any act of international terrorism[57] and the proliferation of weapons of mass destruction[58] constitute threats to peace under Article 39 of the UN Charter.

5. Development Co-operation and Environmental Conservation as New Objectives

The preamble, Article 1 and Arts 55-56 of the Charter make reference to the role of the United Nations in promoting international economic and social co-operation. Yet, in 1945 this was based upon the interesting assumption that such co-operation would be instrumental in achieving "peaceful and friendly relations among nations".[59] Hence, the interest of international economic and social welfare was thus subordinated to

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55 S/RES/232 (1966) of 16 December 1966 and S/RES/253 (1968) of 29 May 1968.

56 S/RES/418 (1977) of 4 November 1977.

57 S/RES/1368 (2001) of 12 September 2001 and subsequent anti-terrorism resolutions.

58 S/RES/1467 (2003) of 18 March 2003.

59 See the opening text of Article 55, reading: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples …"

the overriding concern to maintain peace and security. Furthermore, "development" as an objective is only mentioned twice, in Article 55 as a general objective and in Article 73 specifically with respect to non-self-governing territories, and not as such in the Preamble or Article 1 on the Purposes and Principles. This can be explained by the fact that in 1945 developing countries hardly participated in international politics. After all, when the UN was established 45 per cent of the world population still lived under colonial rule. This changed rapidly in the years following the establishment of the UN, and as a result the membership of the organization increased in the period 1945-1960 from 51 to 100 states. In addition to decolonisation, the development of the peoples and the countries of the South soon emerged as an important new objective. In the late 1940s, the UN was already establishing the first programs for technical aid and programs of grants. Not only did the UN over time establish a host of subsidiary organs to undertake operational activities and to address concerns of developing countries (WFP, UNCTAD, UNDP, UNIDO, to mention just a few), the United Nations also evolved as the major agent of normative development in this field.[60] Throughout the history of the United Nations, numerous resolutions have been adopted, especially by the General Assembly, which have shaped the contours of both a UN development ideology and international law relating to the development of developing countries. The latter emerged as a result of both UN normative resolutions and the practice of states and international institutions such as the World Bank and the GATT/WTO.

Similarly, environmental conservation emerged as a new key concern of the United Nations. While environmental problems have featured on the UN agenda from the 1950s, it can be said that the main impetus came from the 1972 Stockholm Conference on the Human Environment.[61] Ever since, the UN and its various organs (most notably the UNEP[62] and UNECE[63]) have served as major platforms for dia-

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60 See further N.J. Schrijver, *Sovereignty over Natural Resources. Balancing Rights and Duties*, 1997, 371-374.

61 See Doc. A/CONF.48/14/Rev.1 of 16 June 1972.

62 UNEP, established soon after the Stockholm Conference by A/RES/2997 (XXVII) of 15 December 1972. See L. Kurukulasuriya/ F. Schlingemann/ L. Sun, *UNEP's New Way Forward: Environmental Law and Sustainable Development*, 1995.

63 United Nations Economic Commission for Europe, which adopted among other legal instruments the Convention on Long-range Transboundary Air Pollution (1979), the Convention on Environmental Impact Assessment in

logue and standard-setting as well as for operational activities, also in co-operation with other institutions such as the World Bank through the Global Environment Facility. The various objectives of the United Nations in the field of environment and development are now aptly summarized in the concept of sustainable development, which in the concise definition of the Brundtland Commission means "development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs".[64] The concept of sustainable development was introduced into international politics at the Rio Conference on Environment and Development in 1992.[65] Since 1992 sustainable development has been endorsed and recognized as a legally relevant concept in a number of instruments of international law. Thus, it is incorporated in various environmental treaties, international fisheries agreements, development co-operation treaties as well as in the 1994 Agreement Establishing the World Trade Organization and in EU law.[66] Currently, the United Nations is attempting to mainstream the concept of sustainable development as a key objective into all relevant fields of policy.[67]

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a Transboundary Context (1991), the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992), the Convention on the Transboundary Effects of Industrial Accidents (1992) and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998).

64 World Commission on Environment and Development, *Our Common Future*, 1987, 43.

65 See Doc. A/CONF.151/26/Rev.1 of 14 June 1992.

66 See N.J. Schrijver/ F.G. Weiss (eds), *International Law and Sustainable Development. Principles and Practice*, 2004; D. French, *International Law and Policy of Sustainable Development*, 2005; M.C. Cordonier Segger/ A. Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects*, 2004.

67 See the 2005 *World Summit Outcome Document* in which the world leaders state that their efforts in this respect will promote: "the integration of the three components of sustainable development – economic development, social development and environmental protection – as interdependent and mutually reinforcing pillars. Poverty eradication, changing unsustainable patterns of production and consumption and protecting and managing the natural resource base of economic and social development are overarching objectives of and essential requirements for sustainable development," A/RES/60/1 of 16 September 2005, para. 48.

The promotion of sustainable development as well as international development and environmental co-operation are now among the core objectives of the United Nations.

6. Authorising Coalitions of the Able and Willing to Use Force

In response to the non-conclusion of the special agreements as envisaged in Article 43 for the delivery of armed forces, assistance and facilities by Member States to the United Nations, an interesting practice emerged by which the Council authorizes Member States "to use all necessary means" to implement Security Council resolutions. An early example of what is nowadays called an "authorization" resolution is Security Council Resolution 83 of 27 June 1950, by which the Council recommended "that the members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security". Members providing military forces (sixteen in total) were advised to make these available "to a unified command under the United States of America".[68]

The diplomatic phrase of with "all necessary means" has become a euphemism for authorizing Member States to use force in international relations.[69] Apart from imposing a variety of sanctions, the Council did not in recent years shy away from showing its teeth, although the actual "biting" became routinely delegated to coalitions of Member States.[70] Thus in Resolution 678 (1990) of 29 November 1990 the Council authorized Member States "co-operating with the Government of Kuwait" to use "all necessary means to uphold and implement" its resolutions ordering Iraq out of Kuwait as well as "to restore international peace and security in the area".[71] The particular phrase "all necessary means" evolved into the standard formula by which the Security Coun-

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68 S/RES/84 (1950) of 7 July 1950.

69 N.M. Blokker, "Is the authorization authorized? Powers and practice of the UN Security Council to authorize the use of force by 'coalitions of the able and willing'", *EJIL* 11 (2000), 541 et seq.

70 On this issue see N.M. Blokker/ N.J. Schrijver (eds), *The Security Council and the Use of Force. Theory and Reality – A Need for Change?*, 2005.

71 S/RES/678 (1990) of 29 November 1990. Earlier the Council had already authorized the use of limited naval force to inspect the compliance of the economic sanctions by ships to and from Iraq and occupied Kuwait. See S/RES/665 (1990) of 25 August 1990.

cil authorized *ad hoc* coalitions or regional organizations to use military force, if necessary, to maintain or restore peace and security. Main examples of employing this technique to authorize coalitions to take "all necessary means" include Operation Restore Hope in Somalia,[72] various resolutions adopted during the crises in the former Yugoslavia, and UN actions in Haiti[73], East Timor,[74] Afghanistan,[75] Côte d'Ivoire,[76] Burundi,[77] Iraq[78] and Liberia[79].

7. Re-Interpreting the Right to Self-Defence

The Charter codified in Article 51 the "inherent" right of every state to individual or collective self-defence in case of an armed attack. However, it qualified this traditional right by requiring immediate reporting to the UN Security Council on the measures taken by Member States in the exercise of this right, and by reserving the right of the Council to take collective measures at any time in discharge of its primary responsibility for the maintenance or restoration of peace and security, thus suspending the right of the victim state to self-defence.[80] Obviously, the right of self-defence as codified in Article 51 stems from a different period. Only inter-state wars were contemplated in 1945. However, the exact interpretation of Article 51 is not cast in iron but has evolved over time. In the post-September 11th world, strong indications exist that Article 51 could also be extended to include armed attacks by non-state

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72 S/RES/794 (1992) of 3 December 1992, which authorizes "the Secretary-General and Member States […] to use all necessary means to establish […] a secure environment for humanitarian relief operations." (para. 10).

73 See S/RES/1529 (2004) of 29 February 2004 and S/RES/1542 (2004) of 30 April 2004.

74 S/RES/1264 (1999) of 15 September 1999.

75 S/RES/1386 (2001) of 20 December 2001 and S/RES/1563 (2004) of 17 September 2004.

76 S/RES/1528 (2004) of 27 February 2004.

77 S/RES/1545 (2004) of 21 May 2004.

78 S/RES/678 (1990) of 29 November 1990. Resolutions after the recent military action against Iraq include S/RES/1511 (2003) of 16 October 2003, S/RES/1546 (2004) of 8 June 2004 and S/RES/1637 (2005) of 11 November 2005.

79 S/RES/1497 (2003) of 1 August 2003.

80 Cf. Y. Dinstein, *War, Aggression and Self-defence*, 2005; and C. Gray, *International Law and the Use of Force*, 2004, and Wolfrum, see note 38.

entities. Moreover, based on the *Caroline* criteria, but dating back to the period of 1837-1841, the right to self-defence also encompasses self-defence against identifiable imminent attacks.[81] This is widely recognized as reflecting customary international law.[82] The use of the words "inherent right" in Article 51 (in the French text of the Charter "*droit naturel")* may well incorporate these criteria, subject of course to the requirements of Article 51 such as immediate reporting to the Security Council and suspension of the right of self-defence as soon as the Council takes collective measures. This led the High-level Panel and the Secretary-General to conclude that there is no need to amend or rewrite Article 51 from the perspective of pre-emptive action. If this interpretation of a wider scope of the right to self-defence is consolidated,[83] there is consequently less reason to allow any room for additional unilateral military action.

8. Expansion of Security Council Powers

In the post-Cold War era the Security Council explored new avenues for discharging its special responsibilities in the field of peace and security. In the early 1990s, the Council established two *ad hoc* international criminal tribunals, one for the former Yugoslavia[84] and another for Rwanda.[85] The competence of the Council to establish such tribunals was not without controversy. It was challenged by several defendants before the Yugoslavia and Rwanda tribunals, but upheld by both tribu-

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81 During the incident with the *Caroline* U.S. Secretary of State Daniel Webster made a classic attempt to define and to limit anticipatory self-defence. In response to wider claims by the British, he stated that such a right arises only when there is: "a necessity of self-defence, …, instant, overwhelming, leaving no choice of means and no moment for deliberation", reproduced in *British and Foreign State Papers* 39 (1857), 1126 et seq.

82 Cf. also R. Jennings/ A. Watts (eds), *Oppenheim's International Law*, 9th edition, 1996, 420.

83 However, see what appears to be *contra* in the recent Advisory Opinion of the ICJ on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, see note 49, 36, para. 139.

84 International Criminal Tribunal for the Former Yugoslavia (ICTY), established by S/RES/827 (1993) of 25 May 1993.

85 International Criminal Tribunal for Rwanda (ICTR), established by S/RES/955 (1994) of 8 November 1994.

nals in appeal.[86] Moreover, after September 11th the Council initiated a new practice by adopting binding resolutions under Chapter VII which were not directly related to a particular situation or country. Thus, in Resolution 1373 of 28 September 2001, the Council imposed a far-reaching set of obligations on all states to prevent them providing terrorists a safe haven or any sustenance or support and denying any access to financial resources. In order to monitor the implementation of a package of general anti-terrorism measures, the Council established the Counter-Terrorism Committee.[87] In a similar vein, the Council adopted general resolutions to prevent the proliferation of weapons of mass destruction, including a duty for states to refrain from providing any support to non-state actors to develop such weapons.[88] It is interesting to note that here the Council is taking on a quasi-legislative role, which hitherto was considered the prerogative of the General Assembly only.[89]

9. The Emergence of the Responsibility to Protect Citizens

In response to the atrocities in Cambodia, Somalia, Rwanda and the former Yugoslavia, it is often stated that this should never happen again. Yet, it does, as can be witnessed for example in Darfur. In recent years, the discussion has been focused on the concept of the responsibility to protect an innocent population, a debate sparked off by the International Commission on Intervention and State Sovereignty.[90] The doctrine of humanitarian intervention is often also labelled as the responsibility to protect innocent people from genocide, crimes against humanity and war crimes. The issue was also addressed in the September 2005

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86 ICTY, *The Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 14-22; ICTR, *The Prosecutor v. Kanyabashi*, Decision on the Defence Motion on Jurisdiction, 18 June 1997, paras 7-29.

87 S/RES/1373 (2001) of 28 September 2001.

88 S/RES/1540 (2004) of 28 April 2004, para. 1.

89 See P.C. Szasz, "The Security Council Starts Legislating", *AJIL* 96 (2002), 901 et seq.; S. Talmon, "The Security Council as World Legislature", *AJIL* 99 (2005), 175 et seq.; M. Happold, "Security Council Resolution 1373 and the Constitution of the United Nations", *LJIL* 16 (2003), 593 et seq.

90 See ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, Ottawa, December 2001, available at: <http://www.iciss.ca/pdf/Commission-Report.pdf>.

Summit Outcome Document where notable progress was made.[91] The world leaders state that:

> "each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability."[92]

In addition, it is said that "*the international community, through the United Nations*, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means," "to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity," and that in that context the UN Member States are prepared:

> "to take collective action, in a timely and decisive manner, *through the Security Council*, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out."[93]

Obviously, this formulation contains quite a number of qualifications and limits the concept of the responsibility to protect populations to situations of genocide, war crimes, ethnic cleansing and crimes against humanity. Nevertheless, it serves as a strong endorsement of the growing opinion held in global civil society that, first of all, national

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91 See the article of P. Hilpold in this Volume.

92 *World Summit Outcome Document*, see note 67, para. 138.

93 Ibid., para. 139. Emphasis added.

governments should exercise their sovereignty in a responsible way and that providing safety for its citizens is a prime duty and that, secondly, there is a secondary responsibility incumbent upon the international community to act should a national government be unable or unwilling to discharge its duties in this respect. The two paragraphs in the World Summit Document seem a step forward on the long road towards better protection – or to protection at all – of innocent populations all over the world against leaders who abuse their powers or manifestly fail in the execution of their duties. Naturally, this will depend very much on the question whether the United Nations suit indeed the act to the word in such situations. If this principle of the *responsibility to protect* citizens and populations really does take root in further legal development and is put into practice in cases that arise, and thus further qualifies the scope of matters which are, in the words of Article 2, para. 7 of the UN Charter, "essentially within the domestic jurisdiction of any state",[94] this could herald the start of a fundamental reorientation in international law: after all, its starting point is the security and fate of *citizens,* and not, in the first place, national security and the sovereignty of *states.* It is still too early to determine whether this will actually happen, as the development of the principle of the responsibility to protect is still in its infancy.

These examples demonstrate how the Charter, within the framework of its basic principles and purposes, can accommodate far-reaching changes without resort to cumbersome formal amendment procedures as provided for in Arts 108 and 109 of the Charter. Nevertheless, at regular intervals, such formal attempts have been made mostly unsuccessfully.[95]

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94 See N.J. Schrijver, "The Changing Nature of Sovereignty", *BYIL* 70 (2000), 65 et seq.

95 See for an exhaustive account the four volumes by J. Müller, *Reforming the United Nations. New Initiatives and Past Efforts*, 1997-2001 and id., *Reforming the United Nations. The Struggle for Legitimacy and Effectiveness*, 2006. See also B. Fassbender, "All Illusions Shattered? Looking Back on a Decade of Failed Attempts to Reform the UN Security Council", *Max Planck UNYB* 7 (2003), 183 et seq.

IV. The Agenda for Charter Reform at the World Summit of September 2005

"A once-in-a-generation opportunity."[96] These were the appealing words employed by UN Secretary-General Kofi Annan to identify the momentum and set the stage for reform of the United Nations on the occasion of its sixtieth anniversary in 2005.[97] Indeed, reform discussions appeared to have gained once again momentum in recent years in response to both increased demands upon the Organization and challenges to its role as a relevant actor in today's international relations. Increased demands stem from the multiple expectations of a role of the United Nations in maintaining or restoring peace and security, combating international terrorism, fighting poverty and promoting sustainable development and respect for human rights. Scepticism as to the relevancy of the organization results from its failure to act timely and decisively in situations such as Rwanda, former Yugoslavia and Darfur. Yet, it was especially the unilateral decision by the United States and the United Kingdom to resort to war against Iraq in 2003 in contravention of the UN Charter which provoked a crisis of relevance of the United Nations.

It is notable that amongst the many reform proposals in the 129 page report *A More Secure World: Our shared responsibility* by Annan's High-level Panel of eminent persons and the 87 page subsequent report *In Larger Freedom* of the Secretary-General himself only few proposals would involve amendment of the Charter of the United Nations.[98] They relate to institutional proposals for a more effective United Nations for the 21st century and to clearing away dead wood in the Charter.

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96 See Kofi Annan, *Investing in the United Nations: for a stronger Organization Worldwide*, Doc. A/60/692 of 7 March 2006.

97 See P. Hilpold, "Reforming the United Nations: New Proposals in a Long-lasting Endeavour", *NILR* 52 (2005), 389 et seq.; see also N.J. Schrijver, "UN Reform: A Once-in-a-Generation Opportunity?", *International Organizations Law Review* 2 (2005), 271 et seq.

98 See paras 297-302 of *A More Secure World*, and paras 216-219 of *In Larger Freedom*, respectively, see note 32.

1. Reform of the Security Council

As regards institutional reform, the High-level Panel elaborated two alternative models for expansion of the membership of the UN Security Council from the current 15 to 24: model A envisaging six new permanent members without veto power and thirteen additional non-permanent members. Model B envisaging eight new semi-permanent members with four year renewable terms and eleven additional non-permanent members. Model B thus creates a new category of eight four-year renewable term seats, in addition to the current five permanent seats and eleven two-year (non-renewable) seats.[99]

Obviously, this would involve amending Arts 23 and 27 of the Charter. In order to make this change not unchallengeable in future, the Panel proposed a review of the composition of the Security Council in 2020, including a review of the contribution of permanent and non-permanent members from the point of view of the Council's effectiveness in taking collective action. Annan endorsed these two models as relevant ones, but in response to widespread dissatisfaction with the proposals of the High-level Panel he explicitly opened the option for "any other viable proposals in terms of size and balance" on which consensus might emerge.[100]

It is a well-known fact that the World Summit failed to make any progress in this particular field. Only two vague paragraphs are included on the reform of the Security Council,[101] stating that the world leaders "support early reform of the Security Council as an essential element of our overall effort to reform the United Nations in order to make it more broadly representative, efficient and transparent" and "thus to further enhance its effectiveness and the legitimacy and implementation of its decisions", followed by the intention "to continuing our efforts to achieve a decision to this end".[102] It was striking that the candidate countries, Japan, Germany, India and Brazil, were not able to gather together the required two-thirds majority of 128 votes, despite their lengthy preparations and active diplomacy, to even make a start on

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99 A *More Secure World*, see note 32, Chapter XIV, paras 244-260.

100 *In Larger Freedom*, see note 32, para. 170.

101 See *World Summit Outcome Document*, see note 67, paras 153-154.

102 Ibid., para. 153.

extending the Council. Fassbender has already referred to a "boulevard of broken dreams."[103]

2. Human Rights: Replacement of the Commission by a Council

The second institutional reform related to the UN Commission on Human Rights.[104] The High-level Panel proposed a universal membership of the 53-member and allegedly highly politicised body and the establishment of an advisory council of some 15 independent experts,[105] whereas Annan proposed to do away altogether with the Commission in view of its declining credibility and professionalism and to replace it by a Human Rights Council of equal standing with the Security Council and the Economic and Social Council.[106] Although the Secretary-General did not say so, it would have required amendment of the UN Charter to effect such a footing of equality of the Human Rights Council as a principal organ of the UN with these two other Councils. The World Summit endorsed the establishment of such a new Council in principle, but left it to the General Assembly to decide on its modalities following "open, transparent and inclusive negotiations to be completed as soon as possible during the sixtieth session, with the aim of establishing the mandate, modalities, functions, size, composition, membership, working methods and procedures of the Council".[107]

Upon extensive consultations and rather difficult negotiations the Assembly succeeded at last on 15 March 2006 to establish such a Council.[108] It was decided that the Council would serve as a subsidiary organ of the Assembly under Article 22 of the Charter, thus requiring no Charter amendment. Compared with the Commission membership was reduced only slightly, from 53 to 47, and to be elected by the Assembly by simple majority (at the time 96 votes) rather than by ECOSOC (by 28 votes or a majority of members present and voting). Furthermore,

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103 B. Fassbender, "On the Boulevard of Broken Dreams: The Project of a Reform of the UN Security Council after the 2005 World Summit", *International Organizations Law Review* 2 (2005), 391 et seq.

104 Established by E/RES/5 (I) of 16 February 1946.

105 *A More Secure World*, see note 32, paras 282-287.

106 Cf. Article 7 UN Charter.

107 *World Summit Outcome Document*, see note 67, para. 160.

108 A/RES/60/251 of 15 March 2006, adopted by 170 votes to 4.

the Council meets three times per year, for a total duration of ten weeks (the Commission had only six weeks), and can convene in emergency sessions (what it did e.g. in connection with the Lebanon crisis in August 2006). The Council has also the competence to suspend membership of a country which is found to be in fundamental breach of its human rights obligations. Notwithstanding such changes, the reform of the UN Commission on Human Rights into a Human Rights Council is in danger of just being more of the same at the moment.[109]

3. The Establishment of the Peacebuilding Commission

A third institutional reform was the establishment of a Peacebuilding Commission.[110] The World Summit endorsed this proposal as tabled by both the High-level Panel[111] and Annan.[112] As in the case of the Human Rights Council, further consultations were necessary as to the modalities of the Commission. These resulted, rather uniquely, in identical and simultaneously adopted resolutions of the Assembly and the Council, respectively, by which the Peacebuilding Commission was established.[113] The core membership of this 31-member intergovernmental body comprises Security Council members, ECOSOC members, leading troop contributors, major donor countries and countries which experienced post-conflict recovery. The mandate of the Commission is mainly directed at post-conflict peacebuilding and recovery only and does not extend to peace diplomacy, aid and protection in the earlier stage of growing conflict.

Regrettably, the lessons learned as to "preventing is better than curing" could not as yet be put into practice. Initially, the High-level Panel

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109 See L. Rahmani-Ocora, "Giving the Emperor Real Clothes: The UN Human Rights Council", *Global Governance* 12 (2006), 15 et seq.

110 For an early comment see C. Stahn, "Institutionalizing Brahimi's 'Light Footprint': A Comment on the Role and the Mandate of the Peacebuilding Commission", *International Organizations Law Review* 2 (2005), 403 et seq.

111 *A More Secure World*, see note 32, paras 261-265.

112 *In Larger Freedom*, see note 32, paras 114-119.

113 A/RES/60/180 of 20 December 2005 and S/RES/1645 (2005) of 20 December 2005. By the separate S/RES/1646 (2005) of 20 December 2005, the Security Council decided that all permanent members shall be members of the Peacebuilding Commission. For the actual composition, see under <http://www.un.org/peace/peacebuilding/membership.htm>.

proposed the mandate of the Peacebuilding Commission to include pro-active monitoring and assistance in preventing countries under stress and risk slide towards state collapse.[114] However, in response to concerns on infringements of national sovereignty Annan sought to limit the functions of the Peacebuilding Commission to the immediate aftermath of war and post-conflict recovery and this is what happened in the resolutions establishing the Commission.[115] The establishment of the Peacebuilding Commission as a joint subsidiary body of the General Assembly and the Security Council could well be accommodated under the current Charter Arts 22 and 29 and thus required no amendment.

4. Clearing Away the Dead Wood in the Charter

Lastly, upon the proposals by the High-level Panel and Annan, the Heads of State and Government expressed their intention to delete Chapter XIII of the Charter on the Trusteeship Council as well as references to this Council in Chapter XII. They resolved to delete the "enemy States" clauses in Arts 53, 77 and 107 of the Charter and requested the Security Council to consider the (non-) functioning of the Military Staff Committee.[116] These amendments are not very urgent since for decades these provisions have been dead wood that could be cut out as part of a wider amendment of the Charter. On the core proposals for amendment at the World Summit in September 2005, i.e. the composition of the UN Security Council and the establishment of the Human Rights Council as a new principal organ of the United Nations, no agreement could be reached at the World Summit.

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114 *A More Secure World*, see note 32, para. 262.

115 See most notably *In Larger Freedom*, see note 32, para. 115, where the Secretary-General states: "I do not believe that such a body should have an early warning or monitoring function, but it would be valuable if Member States could at any stage make use of the Peacebuilding Commission's advice and could request assistance from a standing fund for peacebuilding to build their domestic institutions for reducing conflict, including through strengthening the rule-of-law institutions."

116 Reference may be made to the cautious, non-committal language in paras 176–178 of the *World Summit Outcome Document*, see note 67, including: "should delete", "resolve to delete" and "request to consider".

V. Final Observations: The United Nations of the Future and the Future of the Charter

The Charter is a special treaty for all sorts of reasons: its widespread ratification; its conciseness; its long history; its primacy and special legal status; and the fact that the Charter itself was the legal basis for an extremely dynamic and comprehensive development of international law in many fields. Altogether this may be called "the law of the United Nations."[117]

Obviously, this Charter law is part and parcel of contemporary international law. However, the features by which it is distinguished from ordinary public international law are its special legal nature, its sources and its increasingly wide circle of actors. Its special nature arises from the fundamental significance of the objectives of the United Nations, reflected in the powers of the Security Council and the special priority position which the obligations under the Charter have in relation to obligations arising from other treaties.[118] Obligations under the Charter have priority over obligations arising from European Union law, as recognized by the European Court of the first instance in Luxembourg in a case on sanctions and anti-terrorist measures in September 2005.[119]

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117 This is reflected in the title of this Yearbook. See P.M. Dupuy, "The Constitutional Dimension of the Charter of the United Nations Revisited", *Max Planck UNYB* 1 (1997), 1 et seq. (11-12). See also H. Kelsen, *The Law of the United Nations: a critical analysis of its fundamental problems*, 1951; R. Higgins, *The Development of International Law through the Political Organs of the United Nations*, 1963; C. Joyner (ed.), *United Nations Legal Order*, 1995; B. Conforti, *The Law and Practice of the United Nations*, 2005.

118 See especially Article 103 UN Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." See also Arts 25 and 48 UN Charter.

119 ECFI, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Case T 306/01; *Yassin Abdullah Kadi v. Council and Commission*, Case T 315/01, 21 September 2005. Cf. also the Lockerbie case at the ICJ, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom and United States), ICJ Reports 1992, 114 et seq.

As regards the sources: UN law was developed, in particular, on the basis of two categories: (i) through 'soft law', notably normative, often groundbreaking resolutions of the General Assembly in the field of human rights, self-determination, peace and security, development and the environment; and (ii) hard law, including peremptory norms (*ius cogens*). The latter includes the prohibition of aggression, genocide, slavery and slave trade, racial discrimination and apartheid, torture and the right to self-determination, to mention the most compelling examples.[120] In terms of actors, the United Nations has been evolving for a long time from an initially interstate organization into an increasingly pluriform world organization with many different actors. In addition to the recognition of the rights of peoples and of individual citizens and the cooperation with other international institutions with their own legal personality, new examples of this trend include Annan's Global Compact initiative and the greatly increased role of "civil society", as reflected in the Cardoso report of 2004 and in the role of NGOs, now sometimes also recognized in Security Council resolutions.[121]

The question arises whether, after so many changes and adaptations, it is actually still possible to continue with this 1945 Charter. There is good reason for a thorough reform of the UN system in the 21st century and for an updating of the Charter. New objectives, such as combating poverty, the conservation of the environment, post-war peace reconstruction, and promoting the rule of law are not or are only barely mentioned in the Charter. The choice of the permanent members of the Security Council, which is still based on the balance of power in 1945, is anachronistic. The enormous increase in the involvement of business organizations and of social movements in the UN is inadequately regulated. Hence, it would be only healthy for a sixty-year-old organization to adapt its statutory texts to these new objectives and circumstances, and at the same time, clear away some dead wood, such as the chapters on the territories whose peoples have not yet attained a full measure of self-government and the provisions on former enemy states (Germany, Italy and Japan). However, as discussed above, this was not successful in the context of the World Summit in 2005. Probably the focus was too much on reforming the UN of the 20th century rather than adequately

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120 J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, 2002, 246-247.

121 An example is S/RES/1325 (2000) of 31 October 2000, which addresses the position of women during times of armed conflict. See also note 40.

equipping the UN of the 21st century for the needs of future generations.

This is most clearly reflected in the proposals for the expansion of the UN Security Council. A Council of 24, 25 or 26 members, rather than the current 15 members, might be more representative, but would probably not facilitate the Council's aim to achieve greater effectiveness and efficiency. In the 21st century it would be more fitting to represent regional organizations in the Security Council, rather than add even more individual countries as permanent members, whether or not with the right of veto. Despite all the divisions and disappointments, the significance of European political cooperation has grown enormously. The African Union is making bold attempts to transcend the weaknesses and eventual fate of its predecessor, the Organization of African Unity. In Southeast Asia and Latin America, regional cooperation is visibly improving. These regional organizations could be initially represented by their presidencies, and in time, preferably by their independent organs: in the case of the EU, the European Commission or alternatively the High Representative for Foreign Affairs.

There is also a need to incorporate better mechanisms to protect transnational and global interests, such as the protection of the earth's vital ecological functions or regulate the international arms trade.[122] This requires many strong partnerships between international organizations, social movements, industry, science and coalitions of like-minded countries. These partnerships are indeed growing, as was evident in the opposition to landmines, and in the efforts to curb climate change and to establish a permanent International Criminal Court. The UN can provide a good forum for this development, provided it is given the opportunity to be more than a purely interstate organization.

The question arises whether the current Charter can accommodate all these changes. Can it still serve as a compass for the new directions we are taking, and can it save us from losing our way? Or can we expect a post-United Nations era? In his fascinating book, *Global Civil Society?* (2003), John Keane predicts that we are moving towards a "cosmocracy", which will be essentially different from all earlier systems of government: from Aristotle to the Westphalian system of states.[123] His ethical ideal is a type of society of world citizens with an ethos without boundaries. In a similar vein, Michael Walzer argues for a world order

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122 On global environmental governance see Secretary-General Annan in his report *In Larger Freedom*, see note 32, para. 212.

123 J. Keane, *Global Civil Society?*, 2003.

in which states still do exist, but with a stronger international organization (more powerful than the UN) with its own armed forces, strong regional systems (such as the European Union) and NGOs with a great deal of influence. His choice is strongly influenced by considerations of the need to prevent the failure of the current world order and to create better guarantees of lasting peace, while promoting equality and individual freedom.[124] In addition, Anne-Marie Slaughter predicts a "networked world order",[125] which, in this author's opinion, is seen predominantly from the perspective of highly developed western countries.

Even if these developments were to take place, there is little reason to believe that the UN Charter can simply be cast aside. As discussed above, the Charter and UN law derived from it have shown a remarkable capacity for adaptation and informal modification in the light of changed circumstances and new needs.[126] At fairly regular intervals global values and fundamental norms are revisited which in turn form the basis for a large number of concrete regulations. Today, these are often established in a vibrant interaction with industry, science, social organizations and pressure groups, together sometimes referred to as 'civil society'. The UN Charter is still at the centre of this web of global values, norms and principles, and as such it is a sort of international constitution:[127] not one that has been cast in concrete, but a living instrument. One would not wish to subject it to a referendum, but the Charter could well continue to serve as the main compass to show the way forward – also through troubled waters.

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124 M. Walzer, "International Society. What is the Best We Can Do?", *Ethical Perspectives* 6 (2001), 201 et seq. See also: <http://www.sss.ias.edu/publications/papers/papereight.pdf>.

125 A.M. Slaughter, *A New World Order*, 2004.

126 In his inspiring pocket-book *The Changing United Nations*, 1967, xvi, I.L. Claude compares the Charter with "a *runway* from which change takes off".

127 See amongst a wealth of publications C. Tomuschat, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century", *RdC* 281 (1999), 9 et seq.; T.M. Franck, "Is the UN Charter a Constitution?", in: J.A. Frowein et al. (eds), *Verhandeln für den Frieden/ Negotiating for Peace: liber amicorum Tono Eitel*, 2003, 95 et seq.; S. Szurek, "La Charte des Nations Unies. Constitution Mondiale", in: Cot/ Pellet/ Forteau, see note 31, 29 et seq. For a sceptical view see G. Arangio-Ruiz, "The 'Federal Analogy' and UN Charter Interpretation: A Crucial Issue", *EJIL* 8 (1997), 1 et seq.