

---

# The Gift of Formalism

Anne Orford\*

Simma, Bruno (ed.), *The Charter of the United Nations: A Commentary*. 2nd edition, Oxford: Oxford University Press, 2002.

## Abstract

*In its fidelity to the text of the UN Charter as the constitution of a world community and in its commitment to the notion of a strong international organization, the 2nd edition of The Charter of the United Nations: A Commentary is markedly different in orientation to the scholarship of those international lawyers who have argued for a purely instrumental approach to international law. In particular, those sections of the Commentary relating to the use of force reject the suggestion that international lawyers might shake off the constraints of the Charter and create a new version of the law. In this sense, the approach taken by the authors of the Commentary resonates with those texts suggesting that international law might offer a resistance to imperialism (specifically of the American variety). However, the notion that the UN Charter embodies an international legal order that is free of the desire for empire is complicated if we turn to those sections of the Commentary that support the trend towards constituting the UN as the manager of problems in the developing world. There, the Commentary produces a vision of a new international law operating through the administration of daily life and the harmonization of systems of control. The essay concludes by exploring that which escapes the formalist gift of fidelity — that which is played out beyond the certainties of the Commentary.*

## 1 Introduction

The seven-year interval that separates the publication of the first and second editions of *The Charter of the United Nations: A Commentary*<sup>1</sup> has been one of great upheaval for international law. A simple roll-call of proper names serves as a reminder of the sense of crisis that pervaded this period: Srebrenica, Kosovo, Seattle, East Timor, New York,

\* Associate Professor, Faculty of Law, University of Melbourne.

<sup>1</sup> B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd ed., 2002) [hereinafter *Commentary*].

Afghanistan.<sup>2</sup> Each crisis seemed to lead beyond the existing international legal order, and to require international law to renew itself and reassert its relevance. Many of the resulting doctrinal or programmatic responses — humanitarian intervention, the war on terror, territorial administration — have been accompanied by the espousal of a flexible approach to the rules governing the use of force, the rejection of calls for fidelity to the text of the UN Charter and the abandonment of a commitment to dialogue in the conduct of international relations.

The preface to the second edition of the *Commentary* makes clear that, for its 72 authors, the volume is envisaged as a response to this sense that international lawyers might shake off the constraints of the Charter and create a new version of the law. The principal editor, Bruno Simma, introduces the *Commentary* with the words:

[T]he present work is not just meant to be a renewed expression of the strong interest of German speaking practitioners and academics alike in the United Nations remaining alive and well. It is also intended as a plea to handle the only truly universal world organization that we have with greater care.<sup>3</sup>

This, then, is not an account framed around the need to reinvent or renew. Rather, it is a call to remain faithful to the cause of establishing a ‘genuine world community’ through ‘the only truly universal world organization that we have’.<sup>4</sup> These words have since taken on an added import in the context of the 2003 war against Iraq and the split between the US and ‘Old Europe’ that erupted over the role to be played by the Security Council in the move to war.<sup>5</sup> If for many international lawyers ‘Iraq’ stands for what lies ‘beyond’ the UN Charter — a world in which the pragmatists of the new American empire espouse a flexible approach to the rules governing the use of force — the *Commentary* represents that which is familiar and known.

This essay will engage with three central aspects of the formalist vision of the UN developed in the *Commentary*: the representation of the UN as a world community, the institutional treatment of the use of force, and the discussion of the ‘machinery’ for dealing with economic and social matters. I conclude by exploring that which escapes or overflows the formalist gift of fidelity — that which is played out beyond the certainties of the *Commentary*.

## 2 Constituting a World Community

In the pages of the *Commentary*, we see the attempt by international lawyers to envisage a world organization capable of representing an international community

<sup>2</sup> On the crisis as the pivot around which the discipline of international law turns, see Charlesworth, ‘International Law: A Discipline of Crisis’, 65 *Modern Law Review* (2002) 377.

<sup>3</sup> *Commentary*, at vii.

<sup>4</sup> *Ibid.*

<sup>5</sup> In response to a question on 22 January 2003 about European opposition to the use of force in Iraq, US Defence Secretary Donald Rumsfeld replied: ‘You’re thinking of Europe as Germany and France. I don’t. I think that’s old Europe. If you look at the entire NATO Europe today, the centre of gravity is shifting to the east and there are a lot of new members’: Hooper and Black, ‘Anger at Rumsfeld Attack on “Old Europe”’, *The Guardian*, 24 January 2003, available at <http://www.guardian.co.uk>, accessed 14 July 2003.

and operating as the agent of a unified and coherent system of international law. The *Commentary* embodies a tradition in international law that works to create an international organization in the image of the sovereign. The law of the UN Charter is treated as a complete system which takes priority over other treaties.<sup>6</sup> The fundamental principle of the maintenance of international peace and security is its unifying norm. In this vision, the UN Charter represents 'the fulfilment of the modernist wish to find a single, comprehensive, and consistent point of view on the political organisation of humankind'.<sup>7</sup> As David Kennedy argues, this tradition in international law 'remains obsessed with the struggle somehow to reinvent at an international level the sovereign authority it was determined to transcend'.<sup>8</sup>

Examples of this vision of the UN and the Charter are spread throughout the *Commentary*. For instance, the section by Ress on 'Interpretation' introduces the Charter as the 'constitution for the world community',<sup>9</sup> a notion echoed by Fassbender and Bleckmann on Article 2(1) ('the UN Charter is the constitution of the entire international community').<sup>10</sup> Simma, Brunner and Kaul on Article 27 argue that the 'UN Charter, as a treaty, constitutes a self-contained system which even claims priority over other agreements'.<sup>11</sup> The importance of its organs are emphasized by Magiera on Article 9, who describes the General Assembly as 'the world's most important political discussion forum',<sup>12</sup> by Frowein and Krisch in their Introduction to Chapter VII, where they follow Dupuy and Morgenthau in claiming that Chapter VII gives the Security Council the role of an 'executive of the international community' or of an 'international government',<sup>13</sup> and by Simma, Brunner and Kaul on Article 27, commenting that the legislative character of Security Council Resolution 1373 (2001) on responses to terrorism is an instance of "'Council law" on a global level'.<sup>14</sup>

Any tensions between the end of constituting a world community and the preservation of state sovereignty are resolved in the direction of an inevitable movement towards the world community. Ress in the section on 'Interpretation' explains that it is difficult ever to sustain a claim that the authority of the organization has been exceeded,<sup>15</sup> or that there are limitations of the sovereignty of the member states that are not legitimate.<sup>16</sup> The section by Nolte on Article 2(7) is equally clear

<sup>6</sup> For an analysis of the related image appearing in the work of Hersch Lauterpacht of the Covenant of the League of Nations as the charter of international society, and of international law as a complete system or autonomous legal order, see M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002), at 361–388.

<sup>7</sup> Koskenniemi, 'Review of Bruno Simma (ed), *The Charter of the United Nations: A Commentary*', 17 *Australian Year Book of International Law* (1996) 227.

<sup>8</sup> Kennedy, 'The International Style in Postwar Law and Policy', *Utah Law Review* (1994) 7, at 14.

<sup>9</sup> *Commentary*, at 16.

<sup>10</sup> *Ibid.*, at 84

<sup>11</sup> *Ibid.*, at 495.

<sup>12</sup> *Ibid.*, at 248.

<sup>13</sup> *Ibid.*, at 702.

<sup>14</sup> *Ibid.*, at 508.

<sup>15</sup> *Ibid.*, at 17.

<sup>16</sup> *Ibid.*, at 15.

that, in terms of the limitation on UN intervention in matters essentially within the domestic jurisdiction of a state, ‘intervention’ has always been read sufficiently broadly, and ‘domestic jurisdiction’ sufficiently narrowly, to suggest that the Article offers little to states seeking to maintain exclusive control over areas of domestic activity.<sup>17</sup> We are left with a sense of the inevitability of this process of internationalization — ‘the area of domestic jurisdiction is constantly being reduced since more and more areas which used to be internal are now being regulated by international law’.<sup>18</sup> While ‘respect for domestic jurisdiction and sovereignty is regularly demanded in resolutions by the General Assembly and other UN organs’,<sup>19</sup> ‘there are not many matters left which a majority of States continues to insist are essentially within domestic jurisdiction’.<sup>20</sup> Thus Nolte concludes that while Article 2(7) gives expression to the principles of state sovereignty and self-determination, and ‘was intended to strengthen the protection of States against incursions into their domestic affairs’, it ‘has been increasingly eroded and emptied of substance’.<sup>21</sup>

### 3 Managing the Use of Force

In its fidelity to the text of the Charter as the constitution of a world community and in its commitment to the notion of a strong international organization, the *Commentary* is markedly different in orientation to the scholarship of those international lawyers who have argued that a purely instrumental approach to international law should be adopted. This instrumentalism can be well illustrated by recent debates relating to the use of force. A number of prominent American international lawyers have argued that it was simply irrelevant and inconsequential whether the resort to force by the US in its ‘war on terror’ against Afghanistan and then Iraq was illegal and in breach of the UN Charter. Any international law that could not meet the objectives set by US policy-makers was to be ignored. So, for instance, Michael J. Glennon argues that the UN Charter provisions governing the use of force ‘cannot guide responsible US policy-makers in the US war against terrorism or elsewhere’.<sup>22</sup> As it is not possible to gain consensus within the international community that the US approach to the use of force to combat terrorism is appropriate, the US should judge for itself what measures should best be adopted for its self-defence, without reference to the UN Charter norms.

Similarly, Anne-Marie Slaughter, the President of the American Society of

<sup>17</sup> *Ibid.*, esp. at 156–158.

<sup>18</sup> *Ibid.*, at 157.

<sup>19</sup> *Ibid.*, at 159. There are interesting discussions of the continued relevance of this Article in the context of the role of the state in implementing human rights obligations (at 161), and of its role in disciplining peacekeeping operations and election-monitoring (at 167).

<sup>20</sup> *Ibid.*, at 171.

<sup>21</sup> *Ibid.*

<sup>22</sup> Glennon, ‘The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter’, 25 *Harvard Journal of Law and Public Policy* (2001) 539, at 541.

International Law, wrote an opinion piece published in the *New York Times* on the bleak morning following Bush's declaration that military action would commence unless Saddam Hussein and his sons left Iraq within 48 hours.<sup>23</sup> There, she defended the decision of the US to abandon its efforts to get UN approval for the prospective invasion of Iraq. Slaughter suggested that:

By giving up on the Security Council, the Bush administration has started on a course that could be called 'illegal but legitimate' ... [E]ven for international lawyers, insisting on formal legality in this case may be counterproductive ... The United Nations imposes constraints on both the global decision-making process and the outcomes of that process, constraints that all countries recognize to be in their long-term interest and the interest of the world. But it cannot be a straitjacket, preventing nations from pursuing what they perceive to be their vital national security interests.<sup>24</sup>

The arguments made by Glennon and Slaughter are the end result of the development that Martti Koskenniemi traces in one strand of American international law since the 1960s, in which any 'notion of international law as a framework for formal inter-sovereign relationships' is replaced 'by a new, flexible, policy-dependent instrument for US decision-makers'.<sup>25</sup> The value of international law is measured by its 'relevance', where relevance is defined as 'instrumental usefulness' and law is of use only where it works as 'an instrument for the values (or better, "decisions") of the powerful'.<sup>26</sup> Law provides American policy-makers with 'the technical avenues through which they can reach their objectives'.<sup>27</sup> Both Glennon and Slaughter support the decision of the US to pursue its 'vital national security interests', free of the 'constraints' imposed by the UN Charter.

Any concern with the political ends or objectives that such an instrumental law might serve is addressed through the 'turn to ethics'.<sup>28</sup> Ethics here means a deformalized yet universal system of norms (justice, democracy, liberalism, human rights), which operates as 'an effective and legitimate constraint over otherwise deformalized decision-making as well as an objective (and legal) guide for foreign policy'.<sup>29</sup> Much has been written about this trend and its effects, particularly in the context of the renewed enthusiasm for 'humanitarian intervention' during the 1990s.<sup>30</sup> This resort to human rights as a basis for justifying preordained security goals can be seen in the follow-up opinion piece by Slaughter written in the wake of the use of force against Iraq. Slaughter argued that '[b]y turning back to the United Nations now, in the moment of victory in Iraq, President Bush can seize a historic

<sup>23</sup> Slaughter, 'Good Reasons for Going Around the UN', *New York Times*, 18 March 2003, A33.

<sup>24</sup> *Ibid.*

<sup>25</sup> Koskenniemi, *supra* note 6, at 481.

<sup>26</sup> *Ibid.*, at 483–484.

<sup>27</sup> *Ibid.*, at 484.

<sup>28</sup> Koskenniemi, "'The Lady Doth Protest Too Much": Kosovo and the Turn to Ethics in International Law' (2002) 65 *Modern Law Review* 159.

<sup>29</sup> Koskenniemi, *supra* note 6, at 489.

<sup>30</sup> See generally A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2003).

opportunity to pioneer a tough-minded and enduring form of multilateralism'.<sup>31</sup> While it is clear to Slaughter that 'the institutions of the post-World War II era aren't yet adapted to address the threats of the post-Cold War era', the answer 'is not to destroy those institutions but rather to reform them'. In particular, it is necessary to 'reform' the Security Council by 'redrawing the lines of how the Security Council defines which threats to international security are sufficient to require the use of force'.<sup>32</sup> For Slaughter, this should involve 'finally linking the human rights side of the United Nations with the security side', so that 'a government's business may more readily become the Security Council's business'.

The extent to which the *Commentary* departs from such a vision is striking. For example, in his discussion of Article 2(4) Randelzhofer consistently prefers those interpretations that read the prohibition on military force as broadly as possible, while reading down possible exceptions (such as humanitarian intervention or rescue operations of a state's nationals).<sup>33</sup> His approving citation of those authors who have described Article 2(4) as 'the corner stone of peace in the Charter', 'the heart of the United Nations Charter' or the 'basic rule of contemporary public international law' emphasizes the extent to which the orientation adopted here departs from the US position outlined above.<sup>34</sup>

Similarly, the sections dealing with Chapter VII differ markedly from much American commentary. Frowein and Krisch in the Introduction to Chapter VII provide a detailed overview of Security Council practice since the end of the Cold War. They consider not only the recourse to Chapter VII measures but also the evolution of Security Council practice in terms of lessons learned about the effectiveness of measures, the recognition of limitations based on international human rights law and international humanitarian law obligations, the development of guidelines for arms embargoes and sanctions management, and the adoption of resolutions on the protection of civilians, women and children.<sup>35</sup> This section offers a critical account of the tendency on the part of the Security Council in the post-Cold War period to adopt and exercise a 'law enforcement' function,<sup>36</sup> a quasi-judicial function,<sup>37</sup> and a quasi-legislative function.<sup>38</sup> It also offers an examination of the extent to which these

<sup>31</sup> Slaughter, 'A Chance to Reshape the UN', *Washington Post*, 13 April 2003, B07.

<sup>32</sup> *Ibid.*

<sup>33</sup> On the absence of any international law rule allowing for humanitarian intervention or the rescue of a state's own nationals, see *Commentary*, *supra* note 2, at 130–133.

<sup>34</sup> *Ibid.*, at 117.

<sup>35</sup> The authors suggest that these latter resolutions 'might initiate a more rule-oriented approach for future action and form the core of a self-created "administrative law" for Security Council measures' (*ibid.*, at 705). They thus miss the chance to address, or initiate, questions about the utility of such resolutions for those who are to be 'protected' and their tendency to legitimize militarism — a symptom of a broader tendency to take as a given the virtuous or progressive nature of most developments throughout the *Commentary* as a whole.

<sup>36</sup> *Ibid.*, at 707.

<sup>37</sup> *Ibid.*, at 708.

<sup>38</sup> *Ibid.*, at 709. Of particular interest is the discussion of the longer-term legislative effects of Security Council resolutions on diamonds, democracy and displaced persons (at 709–710).

developments can be reconciled with ‘the legal order of the UN Charter’.<sup>39</sup> The authors there express concerns about precisely the kinds of developments that American commentators celebrate as flexible and pragmatic.

In particular, the discussion of the need to interpret resolutions under Chapter VII narrowly because ‘limitations on sovereignty may not be lightly assumed’ differs radically from the position urged by the US administration in the interpretation of Security Council Resolution 1441,<sup>40</sup> as does the discussion of whether there exists authorization to act unilaterally to enforce Security Council resolutions.<sup>41</sup> Frowein and Krisch treat the NATO action in Kosovo and the air strikes on Iraq during the late 1990s as illegal,<sup>42</sup> and are critical of the imprecise and broad authorization of the use of force as in Security Council Resolution 678, quoting the Secretary-General on ‘the danger that the states concerned may claim international legitimacy and approval for forceful actions that were not in fact envisaged by the SC when it gave its authorization to them’.<sup>43</sup> In turn, the section by Bothe on ‘Peace-keeping’ is critical of the unwillingness on the part of powerful states ‘to leave the direction of substantial military operations to the United Nations’.<sup>44</sup> He thus argues that we have not yet seen a peace enforcement action as envisaged under Chapter VII — instead, what we have seen is ‘unilateral action undertaken by a group of States without the specific authorisation of the Security Council’.<sup>45</sup>

The section on Article 51 by Randelzhofer demonstrates particularly clearly the difference between the approach taken by American pragmatists and that of the *Commentary*. He supports the view widely criticized by US scholars that ‘any State affected by another State’s unlawful use of force not reaching the threshold of an “armed attack” is bound, if not exactly to endure the violation, then at least to respond only by means falling short of the use or threat of force . . . Until an armed attack occurs, States are expected to renounce forcible self-defence.’<sup>46</sup> The only option is to

<sup>39</sup> *Ibid.*, at 708. The *Commentary* also gives a good picture of the broad and expanding scope of Security Council activity in the section by Paulus on Article 29. He provides a wide-ranging discussion of Security Council subsidiary organs, including the various UN Commissions established in 1991 in the aftermath of the Gulf War, the Counter-Terrorism Committee, the International Criminal Tribunals and the transitional administrations established under Security Council authority in Cambodia, Kosovo, East Timor and in part in Bosnia-Herzegovina (at 547–563). This section is not uncritical — Paulus questions the ‘competence of the Security Council to substitute Chapter VII measures and Article 29 for the more burdensome avenue of treaty-making’ in the form of the counter-terrorism Security Council Resolution 1373 (at 553, and see also Frowein and Krisch, at 709), and argues that the two international tribunals were created in part as an act of contrition in light of the inability of the Security Council to act to prevent the egregious violations of international humanitarian law in the former Yugoslavia and Rwanda (at 556, 560).

<sup>40</sup> *Ibid.*, at 713.

<sup>41</sup> *Ibid.*, at 713–714.

<sup>42</sup> *Ibid.*, at 754.

<sup>43</sup> *Ibid.*, at 759, quoting *Supplement to an Agenda for Peace*, UN Doc A/50/60-S/1995/1, 3 January 1995, at para. 80.

<sup>44</sup> *Ibid.*, at 664.

<sup>45</sup> *Ibid.*, at 663.

<sup>46</sup> *Ibid.*

call on the Security Council to define the use of force as a breach of the peace and decide on measures under Articles 41 or 42. Randelzhofer also argues that anticipatory self-defence is not permissible.<sup>47</sup> He admits that this is not a satisfactory reading as it provides ‘very little protection against States violating the prohibition of the use of force’ but calls for ‘due regard’ to the distinction in the ‘clear wording’ of Article 2(4) (prohibiting the use of force) and Article 51 (allowing self-defence in the face of armed attack).<sup>48</sup> This is a long way from the flexible reading of Article 51 advocated even by more UN-friendly American commentators such as Thomas Franck.<sup>49</sup>

The authors find little in the Charter to limit the expansion or evolution of the jurisdiction or power of the Security Council. In the section on Article 39, Frowein and Krisch overview the evolution of the concept of a threat to the peace, to include internal conflicts,<sup>50</sup> violations of human rights and international humanitarian law,<sup>51</sup> violations of democratic principles,<sup>52</sup> and terrorism and arms control.<sup>53</sup> While they find few substantive limitations to the powers of the Security Council, the authors there read the concept of ‘determination’ as providing the principal procedural limitation on the exercise of jurisdiction by the Council.

To some degree, this requirement forces the Security Council to adopt a consistent practice with respect to the threshold for its action under Chapter VII, since it cannot decide simply on the basis of political expediency but must enter into a principled discussion on the minimum conditions for enforcement action, applicable also in similar cases.<sup>54</sup>

The Security Council thus cannot be controlled through any process of judicial review or top-down enforcement system, but the imposition of procedural conditions requires of its members a commitment to dialogue and accountability.

Some of the material on articles relating to the use of force will be of particular interest in light of the war against Iraq. So, for example, the interpretations of Resolutions 678 and 687 offered in the section by Delbrück on Article 25 are of relevance, given the reliance by the US on breaches of these resolutions as the basis for its use of force in Iraq.<sup>55</sup> Similarly, it is useful to be reminded by Schütz on Article 26 of the determination that the ‘regulation of armaments’ rather than ‘disarmament’ was

<sup>47</sup> *Ibid.*, at 803–804.

<sup>48</sup> *Ibid.*, at 791.

<sup>49</sup> See further T. M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (2002).

<sup>50</sup> *Commentary*, at 723–724.

<sup>51</sup> *Ibid.*, at 724–725.

<sup>52</sup> *Ibid.*, at 725.

<sup>53</sup> *Ibid.*, at 725–726.

<sup>54</sup> *Ibid.*, at 727.

<sup>55</sup> The assertion of an authorization to use force in response to Iraq’s ‘material breaches of its disarmament obligations under relevant Security Council resolutions’ was relied upon in *Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, 21 March 2003, S/2003/351 [*Letter dated 20 March 2003*]. See also Remarks by the President in Address to the Nation, The Cross Hall, 17 March 2003, available at <http://www.whitehouse.gov/news/releases/2003/03> (accessed 12 May 2003).



the legitimate goal of an international organization,<sup>56</sup> given the centrality of ‘disarmament’ as the end of both the war against Iraq and more broadly as a key plank of the 2002 US *National Security Strategy*.<sup>57</sup> And as if providing a rebuttal to the debates about the use of the veto power that were to erupt in early 2003 concerning the authorization of the use of force against Iraq, Simma, Brunner and Kaul on Article 27 point to the fact that the ‘in-built inequality’ that exists as a result of the voting procedures and the establishment of the veto power in Article 27 is an inherent part of the political settlement that resulted in the creation of the UN. ‘Article 27(3) provides a firm and explicit basis for the exercise of the veto. It provides no basis whatsoever for any argument against the veto power as such or actual vetoes being cast in a specific situation.’<sup>58</sup> Similarly, in the discussion of the use of force by NATO in Kosovo, Ress and Bröhmer conclude:

Paust has proposed that Article 53 is, in effect, not applicable when the Security Council ‘is veto-deadlocked with respect to its ability to make “decisions” on “enforcement action”’. That view is untenable, as the presumption is already misleading. It is not that the Security Council is in any way ‘deadlocked’, it is only that, due to the special rights granted by the Charter to the permanent members of the Security Council, the authorization is not granted when some think it should have been granted.<sup>59</sup>

There is little sense in these sections on collective security that this is a world of politics rather than merely technical drafting and institutional competence. So, for example, in their critical discussion of the practice relating to termination of Chapter VII measures, Frowein and Krisch treat as a problem the requirement of a reverse veto to terminate measures enacted for an unlimited time period. Their solution is more careful drafting — when the Security Council introduces measures under Chapter VII, it should enact less strict voting requirements for the termination of the measure, use time-limited measures or specify that the Secretary-General is to determine when the obligations of a specific measure have been met. While these are useful suggestions for situations where members of the Council have reached a consensus on the desirability of avoiding the reverse veto, it does not address situations where obfuscation of this question or the requirement of a reverse veto are precisely the aim of some of the permanent members, or where no agreement can be reached on this issue when the measure is introduced.<sup>60</sup>

Similarly, while the section by Bothe on ‘Peace-keeping’ offers a useful list of facts, statistics and acronyms relating to peace-keeping operations, and a brief account of missions and operations to date, it is also a case-study of the ways in which such lists paint an institutional picture stripped of desire, fantasy and politics.<sup>61</sup> It adopts

<sup>56</sup> *Commentary*, at 466, 469.

<sup>57</sup> *Letter dated 20 March 2003*, *supra* note 55; and *The National Security Strategy of the United States of America*, September 2002.

<sup>58</sup> *Commentary*, at 514.

<sup>59</sup> *Ibid.*, at 869. This provides a response to Slaughter, who reads the NATO intervention in Kosovo as providing the precedent for the use of force by the US and its allies in Iraq.

<sup>60</sup> *Ibid.*, at 714.

<sup>61</sup> *Ibid.*, at 664–683.

unquestioningly the language of failed states, of humanitarianism and of crisis management, while many international lawyers have argued that such a framework masks the ways in which these exceptional cases of humanitarian intervention serve to concentrate power in the hands of elites in particular states.<sup>62</sup> There is no discussion of the controversies and scandals that have marked some of the missions described in this section. So, for example, the analysis of the tragedies of Srebrenica and Rwanda is limited to the comment:

It is true that the lack of success of certain peace-keeping operations (UNOSOM II, UNPROFOR, also UNOMUR) has prompted calls for ‘robust’ peace-keeping, but if that means to give up the advantages of the consensual approach, the international community would lose an important tool of conflict management.<sup>63</sup>

This paragraph, and its treatment of peace-keeping as a ‘tool’ of ‘management’, brings to mind Koskeniemi’s description of the ‘tension between ethics and institutions (or tradition and modernity) . . . visible in post-war internationalism’.<sup>64</sup> Once the search for solutions settles upon institutions and their competence, we are left with ‘a purely institutional-pragmatic technical discourse in which an autonomous super-criterion of “effectiveness” or “binding force” will determine the acceptability of binding outcomes. Normative politics becomes institutional technique’.<sup>65</sup>

## 4 The UN as Benevolent Machine

Many of the sections of the *Commentary* I have discussed so far portray the Charter as a regime that constrains the ability of states to further national interests or achieve imperial ambitions. This aspect of the *Commentary* resonates with those texts that have appeared in response to American militarism of the post-Cold War era, suggesting that international law in particular, and the ‘emancipatory legacy of Europe’ in general, might offer a resistance to imperialism (specifically of the American variety).<sup>66</sup> However, the sense that the UN Charter embodies an international legal order that is free of the desire for empire is complicated if we turn to those sections of the *Commentary* that support the trend towards constituting the Security Council as a global police force and the UN as the manager of problems in the developing world.<sup>67</sup>

For example, the suggestion by Frowein and Krisch on Article 41 that the practice

<sup>62</sup> See, for example, Charlesworth, *supra* note 2; Koskeniemi, *supra* note 28; Orford, *supra* note 30.

<sup>63</sup> *Commentary*, at 664 (references deleted). For a detailed analysis of the meanings of this ‘lack of success’ for international law, see Orford, *supra* note 30, at 186–219.

<sup>64</sup> Koskeniemi, *supra* note 6, at 397.

<sup>65</sup> *Ibid.*, at 397.

<sup>66</sup> On the ‘emancipatory legacy of Europe’ as a resource for resisting American imperialism, see S. Žižek, *Welcome to the Desert of the Real! Five Essays on September 11 and Related Dates* (2002), at 145.

<sup>67</sup> On the relationship between international law and imperialism more generally, see Berman, ‘In the Wake of Empire’, 14 *American University International Law Review* (1999) 1521; Gathii, ‘Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy’, 98 *Michigan Law Review* (2000) 1996; Orford, *supra* note 30, at 40–56.

of administrators in territories such as Kosovo and East Timor is really trusteeship by another name is compelling, as is the suggestion that these administrations are conducted under Article 41 rather than Articles 82 and 83 so as to allow 'the Security Council greater liberty in the design of the administrations and [make] them less vulnerable to later objections'.<sup>68</sup> Yet I find somewhat surprising their preference for the formalization of this rule, and the suggestion that international administration over such territories should be guided by the standards set out in Chapter XII on the conduct of trusteeships or by the utilitarian calculus assumed in creating 'a balance between the interests of the population and the objective of effectively maintaining international peace and security'.<sup>69</sup> As the sections in the *Commentary* dealing with the trusteeship powers and obligations serve to remind us, these Articles worked to create a 'system' in which trust territories were to be subject to protection, development, tutelage and surveillance,<sup>70</sup> and in which their 'advancement' was to be the main objective.<sup>71</sup>

In his study of the earlier Mandate System of the League of Nations, Antony Anghie has described the ways in which this regime served to transform colonial territories 'into sovereign, independent states which nevertheless remained subordinate economic entities and which continued to perform their traditional functions within the international economy of supplying raw materials to, and markets for, the metropolises'.<sup>72</sup> For Anghie,

the purpose of the Mandate System was not so much to end colonialism as to change its form and method of implementation: to create a new set of sciences, mechanisms, and technologies for better facilitating the transition from backwardness to advancement while ensuring that the integration of sovereign, mandate territories did not seriously disrupt the international economic system.<sup>73</sup>

In short, the mandate and trust regimes provided a blueprint for the forms of neo-colonialism or recolonization which have been the subject of much recent critical analysis in international law and elsewhere.<sup>74</sup>

A similar sense emerges from the overall discussion of the economic and social functions of the UN. The sections of the *Commentary* dealing with economic and social matters provide a useful corrective to the focus purely on the collective security role of the UN in public debates relating to the war on terror. We are offered a detailed study

<sup>68</sup> *Commentary*, at 744.

<sup>69</sup> *Ibid.*, at 744. Some critical discussion of the role of utilitarian calculations would also be of interest in the discussion of human rights as a limitation on Security Council action — the authors note merely that the Security Council sees itself as bound to 'take into account the humanitarian consequences and human rights implications, and to weigh them against the interest in adopting a certain measure' (at 746).

<sup>70</sup> For example, the section by Rauschnig on Article 75 links the principle of rule over a foreign population expressly for its benefit 'by fully developed States acting as trustees' underpinning this system directly (if uncritically) with the writings of de Vitoria and the speeches of Edmund Burke on India (*ibid.*, at 1099).

<sup>71</sup> *Ibid.*, at 1107.

<sup>72</sup> Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World', 32 *New York University Journal of International Law and Politics* (2000) 243, at 279.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

of the broad range of activities conducted and overseen by the UN. Some sections are of mainly historical interest, such as the review by Ginther on Article 4 of debates about membership during the Cold War and the decolonization era, which suggests that the anterior conditions of statehood are indeed the stuff of international politics,<sup>75</sup> or the informative and detailed account of the law relating to non-self-governing territories and the operation of the trusteeship system.<sup>76</sup> Other sections offer extremely useful overviews of particular areas of activity, such as that offered by Riedel on Article 55(c) dealing with mechanisms for human rights protection,<sup>77</sup> and on Article 68 discussing extra-conventional mechanisms for human rights protection.<sup>78</sup>

The result is a fascinating image of a busy and benevolent organization — an image that seems, however, both too unified and too parochial and removed from the world of other international organizations and actors. In terms of the former response, the sense of a unified and complete system produces something like Michael Hardt and Antonio Negri's image of the new global sovereign subject of Empire.<sup>79</sup> The *Commentary* uses the language of 'machinery' (at 898) and 'integrated management processes' (at 337), 'programme planning cycles' (at 337) and 'outputs' (at 337), collection and dissemination of 'information' (at 914) and 'technical assistance' (at 905), to deal with issues formulated as 'population problems' (at 915), 'social development' (at 914), 'stimulating investment' (at 911) and solving 'Third World debt' (at 911). The section by Wolfrum on Article 55(a) and (b) stresses the 'coherence of the principles and goals of the UN' — 'maintaining international peace and security not only requires banning the use of force in international relations but also requires actively working for economic stability within and among States'.<sup>80</sup> We might then say that this 'machinery necessary for dealing with economic and social matters' works for justice, peace and progress, or to translate this into less benign terms, we might think of this process in terms of normalization, biopolitical management and surveillance.

This more sinister view can be better illustrated through a concrete example. In the section on Article 55(a) and (b), Wolfrum discusses the creation of 'new institutions' to 'ensure the adequate performance of the UN's functions under Article 55'.<sup>81</sup> These institutions were to enable assistance for activities such as economic development, solving population problems, control of the environment and emergency relief. Many of these agencies are now *in situ* in Iraq. While the Security Council was unable to prevent the use of force by the US, the briefest glance at the homepage of the UN will

<sup>75</sup> *Commentary*, at 179–184. On the problems for modern international law that arise from the fact that there must be an 'anterior rule about the conditions for sovereignty', see M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), at 262.

<sup>76</sup> *Commentary*, at 1089–1138: Fastenrath (on Articles 73 and 74), Rauschnig (Articles 75 to 85), Geiger (Articles 86 to 91).

<sup>77</sup> *Ibid.*, at 924–940. That section offers a particularly useful overview of methods of implementation (at 933–940) and of proposals to review human rights mechanisms (at 940–941).

<sup>78</sup> *Ibid.*, at 1027–1057.

<sup>79</sup> M. Hardt and A. Negri, *Empire* (2000), at xii, 4.

<sup>80</sup> *Commentary*, at 898.

<sup>81</sup> *Ibid.*, at 905.

convince you that there is an authority hard at work redeeming that situation.<sup>82</sup> Clicking on the heading 'The situation in Iraq', one moves through to a page providing a sense of frenzied organizational activity. There are links to no fewer than ten UN specialized agencies, all listed by acronym (UNDP, OHCHR, UNEP, UNESCO, UNICEF, etc), and all advertised as 'mounting a concerted effort to assist the Iraqi people'. Security Council Resolution 1441 is available in the six official languages of the Security Council (although we all know that we cannot translate it from the American). Countless fact sheets, reports, video links, summaries, multimedia resources, and maps attest to the existence and the relevance of the Organization. While the pre-war concerns of the international economic organizations and the arms inspectors concerning Iraq were the lack of information and the failure of surveillance, in post-war Iraq international management is in full flight. One effect is to perform the constitution of a sovereign authority from the text of the UN Charter, here evidenced in the production of documents and activity by and on the part of UN organs and agencies in the aftermath of the war against Iraq. All seems designed to prove the point made by Costas Douzinas that:

In international law, the frenetic legislative activity indicates this desire [for a Father or law-maker] at its strongest. Excessive law-making is a substitute for the obvious lack of a unitary legislator and credible implementation, a rather transparent attempt to claim that an author exists because otherwise so many texts would not have come into existence and so much progeny would not have been orphaned.<sup>83</sup>

An equally strong effect is the sense that all this activity is essentially humanitarian. The tone of the Charter shifts to the language of assistance, protection, cooperation, progress, development and solutions to problems, and this is reflected in the *Commentary*. We are left again with a vision of international institutions and international law as the bearers of progressive values. Yet the scene in Iraq described above would seem already to be the performance of that model of the future for the UN imagined by Slaughter — one in which the human rights machinery of the Organization is harnessed to the security priorities of the US and its allies.<sup>84</sup> We might read this as a model example of the UN working for the greater good of the poor, suffering people of Iraq, or we might want to think critically about the ways in which these different aspects of the 'machine' work together to enable and legitimize the reconstruction of cultures the world over as capitalist, liberal democracies committed to privatization, foreign investment, limited regulation and law and order.

The vision of the economic and social work of the UN painted in the pages of the *Commentary* is parochial in its failure to pay sufficient attention to other international organizations and their activities. As a result, it is possible to paint a picture of a world

<sup>82</sup> <http://www.un.org>.

<sup>83</sup> C. Douzinas, *The End of Human Rights* (2000), at 329.

<sup>84</sup> This tendency to assume the benevolent intentions behind the evolution of UN practice in the fields of administration, reconstruction or development is perhaps evidenced by the assumption that the 'Security Council adopted the oil-for-food programme for Iraq in order to alleviate the suffering of the population' (*Commentary*, at 746). One would have to focus only on the 'for-food' part of the equation to reach that unambiguous characterization.

in which international organizations and developed countries work for the ends of peace, development and human rights. In particular, the assumption of a benevolent global regime of cooperation and assistance moving towards increasing assistance and progress is disturbing in light of debates and criticisms relating to the effects of other international organizations — the World Bank, the IMF, the WTO. To take just two examples, the suggestion that ‘preferential and non-reciprocal treatment of developing countries’ is a principle that has since formed the basis of international economic agreements is difficult to sustain if a broad reading of existing trade agreements is undertaken.<sup>85</sup> While developing countries are subject to non-reciprocal treatment, this often works in the direction of favouring the trade interests of developed countries. Many commodities that are the speciality of developing countries have simply been exempted from trade disciplines for most of the past century, agreements such as TRIPS and GATS transparently favour the interests of developed countries, and practices such as the subsidizing of agricultural products for export make it extremely difficult for developing countries to compete on the world market. If to that is added a study of the ways in which the IMF and the World Bank impose conditions upon states in ways that further entrench the market advantages of developed countries, it is impossible to argue that the minor and largely unenforceable gestures of ‘preferential treatment’ made in trade agreements have any real meaning.

Similarly, it is startling to read of the UN practice of responding to ‘food shortages’ and the ‘worsening world food situation’ with resolutions exhorting the ‘inalienable right to be free from hunger’ without further criticism or comment.<sup>86</sup> Given the ways in which the organizations mentioned above have facilitated the privatization of ownership of seeds through TRIPS while exempting trade in agricultural products from serious commitments, and the ways in which the IMF and the World Bank require changes in land title regimes or support resettlement projects which dispossess small farmers, it is striking to find no further comment on the international contributions to the conditions that have led to food shortages.

The vision of a new imperial law operating through the administration of daily life and the harmonization of systems of control and coercion to create a new global subject is the trajectory mapped in Hardt and Negri’s *Empire*. They there present a genealogy of ‘juridical forms that led to, and now leads beyond, the supranational role of the United Nations and its varied affiliated institutions’.<sup>87</sup> Moral intervention prepares the stage for military intervention, and vice versa.<sup>88</sup>

All conflicts, all crises, and all dissensions effectively push forward the process of integration and by the same measure call for more central authority. Peace, equilibrium and the cessation of conflict are the values toward which everything is directed.<sup>89</sup>

<sup>85</sup> *Ibid.*, at 908.

<sup>86</sup> *Ibid.*, at 913.

<sup>87</sup> Hardt and Negri, *supra* note 79, 4.

<sup>88</sup> *Ibid.*, at 37.

<sup>89</sup> *Ibid.*, at 14.

The discussion by Nolte of the debates about Article 2(7) within the UN post-Kosovo gives a similar sense of the relationship between moral and military intervention through an account of the expanding scope of authority for the UN and an inability of states to fall back on sovereignty as a basis for resisting intervention. Nolte notes that even those states described as 'sovereignty-minded' were interested in preventing 'more massive forms of intervention' and therefore supported increased intervention short of the use of force on the part of the UN.<sup>90</sup> As a result:

Since most States have expressed their support of a 'culture of prevention', it appears that the Kosovo crisis has ultimately resulted in widespread agreement that the powers of the UN organs, in particular that of the Security Council, to initiate and undertake measures of conflict prevention outside Chapter VII without violating Article 2(7) are rather broad.<sup>91</sup>

While I do not see the world moving inexorably towards the creation of a new, unitary source of authority, whether that be the UN or a global subject of Empire, I would have preferred to see the authors of the *Commentary* offer some critical analysis of the effects of the movement towards ever greater levels of micro-management when linked to more coercive mechanisms for influencing the social and political conditions of life in many states. There is no sense that surveillance or technical assistance might create the kind of bio-political regimes critiqued by Michel Foucault in the context of European liberal polities and now at work globally to enable the intimate management of everyday life for many people.<sup>92</sup>

## 5 Beyond the Gift

Despite these criticisms, the *Commentary* as a whole is a work of great value in the current context of debates about the need for radical reform of the UN and its Charter. Simma opened the preface to the first edition of the *Commentary* by describing it as a 'birthday present of the German-speaking international legal profession to the United Nations at the occasion of its 50th anniversary in 1995', and a gift it still is, a gift of faith, of careful and loving attention to an organization and the ideals it embodies. Yet the *Commentary* 'overflows the (given) presence of the present, the given of the gift'.<sup>93</sup>

<sup>90</sup> *Commentary*, at 165.

<sup>91</sup> *Ibid.*, at 166.

<sup>92</sup> For an introduction to the body of Michel Foucault's work dealing with bio-politics, see M. Foucault, *The History of Sexuality: An Introduction* (transl. R. Hurley, 3 vols. 1980), vol. 1, at 143 ('If one can apply the term *bio-history* to the pressures through which the movements of life and the processes of history interfere with one another, one would have to speak of *bio-power* to designate what brought life and its mechanisms into the realm of explicit calculations and made knowledge-power an agent of transformation of human life. It is not that life has been totally integrated into techniques that govern and administer it; it constantly escapes them ... But what might be called a society's "threshold of modernity" has been reached when the life of the species is wagered on its own political strategies. For millennia, man remained what he was for Aristotle: a living animal with the additional capacity for a political existence; modern man is an animal whose politics places his existence as a living being in question.'): Foucault, 'Two Lectures', in C. Gordon (ed.), *Power-Knowledge: Selected Interviews and Other Writings 1972-1977* (transl. C. Gordon, L. Marshall, J. Mepham and K. Soper, 1980), at 78-108.

<sup>93</sup> J. Derrida, *The Post Card: From Socrates to Freud and Beyond* (transl. A. Bass, 1987), at 283.

Where Simma presents us with a gift of fidelity, what overflows or accompanies that gift is uncertainty. If we read the marginalia of the text as framing the main business of fidelity and careful attention to detail, we ‘gain access to that which is played out here beyond the “given”, to that which is rejected, withheld, taken back, beyond . . .’<sup>94</sup>

What then lies beyond the *Commentary*? Anxiety about the grounds of authority seeps out around the edges of this text. This anxiety is suggested by the invocation in the preface of a language community of German-speaking scholars, itself a response to the threat of an alien reading. The preface offers the *Commentary* as an ‘expression of the strong interest of German speaking practitioners and academics alike in the United Nations remaining alive and well’, thus drawing the authors of the book into a family. As Derrida notes, the response to a threat to mastery or authority may well be ‘to regroup one’s forces and to find oneself once more amongst one’s own, one’s derivatives, offspring, representatives, couriers, postmen, ambassadors and lieutenants.’<sup>95</sup>

Yet this attempt to create a proper family fails immediately in the opening section on the history of the UN Charter, where Grewe and Khan seem compelled to search for a father who cannot be found. In one passage, the authors report that while ‘some individual authors, among them scholars and politicians, did develop and publish ideas which flowed into the general discussion . . . nowhere can their influence on the final shape of the Charter be authenticated’.<sup>96</sup> Later, they comment apologetically that ‘[a]s in the case of the experts, it is difficult to single out an individual statesman as the intellectual father of the Charter or of one of the UN institutions’,<sup>97</sup> and again in the discussion of the Dumbarton Oaks Conference repeat that ‘[o]nce again the question of who the authors of these proposals were can only be answered in a very vague manner’.<sup>98</sup>

A lack of grounding authority, or an original meaning, is also faced when international lawyers try to deal with the question of the authentic languages of the Charter. According to Article 111 of the Charter, the Chinese, French, Russian, English and Spanish texts are equally authentic, and thus ‘all accorded equal authority’.<sup>99</sup> Of course, ‘differences between the various versions cannot be avoided’, but ‘[n]o version may be overlooked with regard to a question of interpretation’.<sup>100</sup> A range of strategies for managing the ‘inevitable problems of interpretation’ have been explored,<sup>101</sup> including deeming the terms of the treaty to have the same meaning in each authentic text, having recourse to the ‘original text’ which formed the basis of

<sup>94</sup> *Ibid.*, at 284.

<sup>95</sup> *Ibid.*, at 345.

<sup>96</sup> *Commentary*, at 3.

<sup>97</sup> *Ibid.*, at 6.

<sup>98</sup> *Ibid.*, at 8. Delbrück on Article 25 is much more confident about the existence of such ‘founding fathers’ and persistently refers to them in fixing the meaning of controversial texts, for example at 448 (‘in the eyes of the authors’), 447 (‘according to the will of the authors’), 445 (‘the intentions of the authors’).

<sup>99</sup> *Ibid.*, at 1379.

<sup>100</sup> *Ibid.*, at 1379–1380.

<sup>101</sup> *Ibid.*, at 1377.



negotiations, giving priority to the ‘clearer texts’ (although of course ‘the asserted clearness is the object of the interpretation’) or adopting the version that best fits with the ‘organizational purpose and the interests of the actual members’.<sup>102</sup> Yet the *Commentary* does not settle on one of these approaches, as if it is distracted by the failure of any to achieve the goal of ‘maintaining a uniform object for interpretation’.<sup>103</sup>

Indeed, in the preface to the first edition of the *Commentary*, Simma specifically equates the problem of translation in international law to the lack of a unitary sovereign authority to ground the meaning of the text:

A different plea for the indulgence of the user is in place, however: not a single author is a native speaker of English. Nevertheless, every contributor had to submit her or his own English text . . . the reader is faced with sixty varieties of more or less subtle ‘German English’. I have to confess that for me this aspect was a constant source of apprehension until I decided to regard it with some sense of humour. After all, like my editorial task of coordinating the moves of dozens of sovereigns, that is, German professors and high-ranking practitioners, does not the language problem that we faced mirror the situation in the United Nations itself?<sup>104</sup>

Here in the preface, Simma abandons, ‘with some sense of humour’, the task he and his colleagues imagine for the UN throughout the *Commentary*, that of ‘coordinating the moves of dozens of sovereigns’. I want to close with this gesture of resigned good humour, a gesture that provides me with a sense of the alternatives embedded in international law as a way of responding to the crises of authority with which I opened this review. Both the terrorist attacks of 11 September 2001 and the US military responses to those attacks — like the serial humanitarian crises of the 1990s — have been experienced by international law as a reminder of that which cannot be enclosed, of that which escapes the law, of the unknown. My hope is that the anxious subjects of international law might react to this insight into the impossibility of ever finally securing the grounds of law with that lightness and good humour evidenced by Simma in his preface to the *Commentary*.

<sup>102</sup> *Ibid.*, at 21–3.

<sup>103</sup> *Ibid.*, at 21.

<sup>104</sup> B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1995), at vii.