

Volume 42 | Issue 3

2010

Book Reviews

Johannes van Aggelen

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Recommended Citation

Johannes van Aggelen, *Book Reviews*, 42 Case W. Res. J. Int'l L. 825 (2010)
Available at: <http://scholarlycommons.law.case.edu/jil/vol42/iss3/14>

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BOOK REVIEWS

SECRETARY OR GENERAL?: THE U.N. SECRETARY-GENERAL IN WORLD POLITICS

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LAW AND PRACTICE OF THE UNITED NATIONS, DOCUMENTS AND COMMENTARY

*Johannes van Aggelen**

This review is dedicated to the memory of Professor Thomas Frank, who has profoundly influenced the publication of the two books under review. His seminar, entitled "Constitutional Law of the United Nations" which was offered at the New York University School of Law since 1957, spanning over half a century, was the spiritual inspiration which led to the second book.

The U.N. publishes, since its inception, albeit on a very irregular basis, a *Repertory of Practice of United Nations Organs*,¹ giving an article-by-article interpretation of its practices. However, the U.N. publication is first and foremost factual rather than analytical in nature. The two books addressed in this book review fill this gap, being both factual and analytical in nature.

Secretary or General?: The U.N. Secretary-General in World Politics has already been extensively reviewed by Professor Margaret McGuinness elsewhere² and for that reason the emphasis of this review will be on the book *Law and Practice of the United Nations, Documents and Commentary*, but will nevertheless discuss some issues not considered in Professor McGuinness' review. It also appears that Professor Simon Chesterman

* Dr. Johannes van Aggelen holds a doctorate from McGill University. From 1980 until 2007 he was a staff member of the U.N. Human Rights Department in Geneva, Switzerland. His teaching experience includes over 200 briefings on the human rights program in English, French, German, Dutch, Spanish, and Arabic. Additionally, he has guest lectured at institutions world-wide and is a prolific writer on international law in various languages.

¹ REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS, available at <http://www.un.org/law/repertory/>. Supplement number seven of volume five, which covered the articles 73–91 over the period beginning January 1, 1985 through December 1, 1988 was only published in 2006.

² Margaret E. McGuinness, *Secretary or General? The U.N. Secretary-General in World Politics*, 102 AM. J. INT'L L. 930 (2008) (book review).

sensed the lacunae in the first book because the issues which Professor McGuinness rightly criticized in her review have been elaborated upon in the second book.

I. SECRETARY OR GENERAL?: THE U.N. SECRETARY-GENERAL IN WORLD POLITICS

In the introduction to the book *Secretary or General?*, the editor stated that the approach to the book was necessarily “selective.”³ The reason, in this reviewer’s opinion, that there is no chapter focusing solely on the administrative responsibilities of the office as well as the absence of a chapter on the relationship between the Secretary-General and the General Assembly to which an annual report is due,⁴ is that these topics did not fit in the structure of the book. Nevertheless, the editor acknowledges that the book discusses these issues, but in a larger context.

A chapter of *Secretary or General?* not discussed in Professor McGuinness’ review is the chapter by Colin Keating entitled *Selecting the World’s Diplomat*.⁵ The selection of the Secretary-General nevertheless is an important issue in *Secretary or General?*, as five of the seven appendices deal with one or more aspects of the selection of the Secretary-General.⁶ The table titled *Use of the Veto in the Appointment of the Secretary-General*⁷ clearly shows that the initial term of appointment and its process established in 1946 such as to “enable a man of eminence and high attainment to accept and maintain the position”⁸ had gone totally astray during the 1950s. In the aftermath of the Cold War the U.N. badly needed new initiatives for appointing its Secretary-General. In particular, the so-called “Wisnumurti Guidelines” for selecting a Secretary-General and the Canadian Non-Paper were instrumental in the revitalization of the process.⁹

II. LAW AND PRACTICE OF THE UNITED NATIONS, DOCUMENTS AND COMMENTARY

The structure of the book *The Law and Practice of the United Nations: Documents and Commentary*¹⁰ is somewhat similar to the approach

³ SECRETARY OR GENERAL?: THE U.N. SECRETARY-GENERAL IN WORLD POLITICS 4–5 (Simon Chesterman ed., 2007) [hereinafter SECRETARY OR GENERAL?].

⁴ *See id.*

⁵ Colin Keating, *Selecting the World’s Diplomat*, in *id.* at 47–66.

⁶ SECRETARY OR GENERAL?, *supra* note 3, at 246–61.

⁷ Keating, *supra* note 5, at 53.

⁸ *Id.* at 49.

⁹ *See* SECRETARY OR GENERAL?, *supra* note 3, at 248 app. 4, 254 app. 6.

¹⁰ *See* LAW AND PRACTICE OF THE UNITED NATIONS: DOCUMENTS AND COMMENTARY (Simon Chesterman et al. eds., 2008) [hereinafter LAW AND PRACTICE].

taken in the book *International Human Rights in Context: Law, Politics, Morals*¹¹ in that it situates legal analysis in the context of policy and practice. *Law and Practice* combines primary materials with expert commentary and contains many thought-provoking questions at the end of each subsection. The editors demonstrate the possibilities and limitations of multilateral institutions in general. The same possibilities and limitations are also demonstrated in *Secretary or General?*, however *Secretary or General?* focused more on the possibilities and limitations of the Head of the Organization.

Law and Practice is divided into four parts: relevance (chapters one and two), capacity (chapters three through six), practice (chapters seven through fourteen), and accountability (chapters fifteen through seventeen). Each chapter begins with an introductory essay by the authors that describes how the documents that follow illustrate a set of legal, institutional, and political issues relevant to the practice of diplomacy and the development of public international law through U.N. practice.

Based on many years of teaching experience, the authors consequently help students form a realistic idea of the work of international diplomacy by demonstrating that negotiations of legal texts such as treaties and resolutions are often based on political compromises. Students will develop an ability to read these documents critically, not only understanding their meaning, but also the political and the bureaucratic interests of the member states behind them.

The selection of illustrative documents, including many judicial decisions and Security Council resolutions, especially in the aftermath of the Cold War, is excellent. *Law and Practice* contains many cross references in its chapters which makes it even easier to understand the issues at hand.

Chapter three on legal status is an excellent example of how to assist students to form sound legal judgment. Chapter four, entitled *The Secretary-General and the Secretariat*, treats in a nutshell issues contained in *Secretary or General?*. However, sub-section 4.2 on the U.N. Administrative Tribunal makes the reader believe that the tribunal is an independent organ.¹² It definitely is not.

Since its statute was changed to deprive litigants, through their respective member states, of their ability to request an advisory opinion from

¹¹ HENRY J. STEINER & PHILLIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* (3rd ed. 2008).

¹² *LAW AND PRACTICE*, *supra* note 10, at 137. The former U.N. Administrative Tribunal (UNAT) consisted of three or four legally trained scholars, rather than permanent court judges, who handed down judgments from the Joint Appeals Board (JAB) twice a year. However, the main reason why UNAT was not an independent organ was that the Secretariat of the JAB personally interfered with the secretariat of the UNAT. This was a clear violation of the principle of independence of the judiciary.

the International Court of Justice,¹³ criticism mounted regarding the U.N. internal justice system. This criticism finally led the General Assembly to approve a total overhaul of the system which resulted in a new system containing both an informal and a formal U.N. Dispute Tribunal from which appeal will be possible to the U.N. Appeals Tribunal.¹⁴ The new system was implemented on July 1, 2009, and the Dispute Settlement Tribunal has already issued more than one hundred judgments, which are available on-line.¹⁵ Sub-section 4.3 on reports of the reform of the Secretariat could also have found a place in the last chapter on reform of the U.N. in general. Chapter six on financing gives insight into issues very often unknown to U.N. staff at large, as it deals with budgetary and financial arrangements taken on by a restrictive number of organs and staff.

The excerpt of the important Advisory Opinion on *Certain Expenses of the United Nations*¹⁶ is rather difficult to read as it mixes the text of the opinion with the interpretation of the authors. This difficulty is also due to the fact that paragraphs are absent from this Advisory Opinion. Professor McGuinness' criticism that in the first book there was no chapter on the U.N.'s administrative and peacekeeping oversight roles¹⁷ is well taken care of in chapter seven (conflict prevention), chapter eight (peace operations), and chapter nine (peace building). These chapters clearly show the pitfalls and the failures which accompanied U.N. missions due to inaction and failure of sound judgment and lack of trust in commanders in the field, as was the case in Rwanda.¹⁸

The chapter on peace building also unfortunately shows the consequences that occur when a high official such as a Special Representative of the Secretary-General oversteps his authority, as was the case in Kosovo.¹⁹

¹³ See G.A. Res. 50/54, U.N. Doc. A/RES/50/54 (Jan. 29, 1996).

¹⁴ See G.A. Res. 61/261, U.N. Doc. A/RES/61/261 (Apr. 30, 2007); G.A. Res. 62/228, U.N. Doc. A/RES/62/228 (Feb. 6, 2008); G.A. Res. 63/253, U.N. Doc. A/RES/63/253 (Mar. 17, 2009).

¹⁵ See Office of Administration of Justice, <http://www.un.org/en/internaljustice/> (last visited Jan. 29, 2010).

¹⁶ *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 157 (July 20), available at <http://www.icj-cij.org/docket/files/49/5259.pdf>; LAW AND PRACTICE, *supra* note 10, at 204–14.

¹⁷ McGuinness, *supra* note 2, at 936.

¹⁸ For the code cable by Annan to Dallaire and the Secretary-General's reply regarding the situation in Rwanda, see LAW AND PRACTICE, *supra* note 10, at 263.

¹⁹ *Id.* at 311–22. See also Michael E. Hartmann, *International Judges and Prosecutors in Kosovo: A New Paradigm in Post-Conflict Peace-Building*, in 2 INTERNATIONAL HUMANITARIAN LAW: CHALLENGES 307–53 (John Carey et al. eds., 2004) (providing an excellent discussion of the power dynamics in Kosovo); KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIGNATION, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP (Albrecht Schnabel & Ramseh Thakur eds., 2000).

The chapters on sanctions (chapter ten) and development (chapter eleven) show that these issues currently play a far more central role in policy and practice of the U.N. in comparison to the early days of the U.N. Chapter eleven also demonstrates progressive development of international law.

In the introduction to chapter eleven, the editors observe that highly ideological debates at the U.N. tend to “result in pragmatic compromises rather than principled strategies.”²⁰ Indeed, former Secretary-General Annan acknowledged this unfortunate development and tried to remedy the situation when he challenged the business community to enter into the so-called “Global Compact” in 1999.²¹ The Global Compact strategy encourages companies to work with U.N. agencies, labor, and civil societies to support principles in the area of human rights, labor, and the environment.²²

It is rather surprising that chapter twelve on self-determination does not contain a subsection on the abortive attempt by Biafra to become an independent state after declaring itself independent from Nigeria in 1967. The civil war between Biafra and Nigeria, which took place from 1967 to 1970, took many lives and the Republic of Biafra was subsequently incorporated in Nigeria.

The introduction to chapter thirteen on human rights provides that there is also a Sub-Commission on the Promotion and Protection of Human Rights.²³ The Sub-Commission has been abolished within the framework of the human rights reform agenda.²⁴ It held one last session in 2006 as a sub-commission of the newly established Human Rights Council.²⁵ The Sub-Commission has been replaced within the new structure by an Advisory Committee to the Human Rights Council,²⁶ a fact that is not mentioned in the book. This Committee was established on March 26, 2008 at the seventh session of the Human Rights Council.²⁷ Eighteen members will serve for a

²⁰ LAW AND PRACTICE, *supra* note 10, at 373.

²¹ Press Release, United Nations, The U.N. and Business—A Global Partnership (July 1999), *available at* <http://www.un.org/news/facts/business.htm>.

²² *See id.*

²³ LAW AND PRACTICE, *supra* note 10, at 449.

²⁴ Sub-Commission on the Promotion and Protection of Human Rights Home Page, <http://www2.ohchr.org/english/bodies/subcom/index.htm> (last visited Jan. 29, 2010).

²⁵ *Id.*

²⁶ *Id.* *See also* Human Rights Council Advisory Committee Home Page [hereinafter Advisory Committee], <http://www2.ohchr.org/english/bodies/hrcouncil/advisorycommittee.htm> (last visited Jan. 29, 2010).

²⁷ Press Release, U.N. Human Rights Council, Human Rights Council Elects Advisory Committee Members and Approves a Number of Special Procedures Mandate Holders (Mar. 26, 2008), *available at* <http://www.unhcr.ch/hurricane/hurricane.nsf/0/6B7007A33E763D6DC1257418006BFCAE?opendocument>.

period of three years and shall be eligible for re-election once.²⁸ The first session took place in August 2008 and the third session was held in August 2009.²⁹ However, the duration of sessions of this new advisory committee is far shorter than that of the former Sub-Commission, which served as a real think tank for the former Commission on Human Rights and consequently the advisory committee might have far less influence on current human rights developments than the Sub-Commission did.

Law and Practice also mentions that seven human rights treaty bodies are in operation;³⁰ however, there are actually eight committees. The Convention on the Rights of Persons with Disabilities, after approval by the General Assembly,³¹ established a committee of ten members which became operational in 2009.³² Of particular interest is the discussion regarding Article 103 of the U.N. Charter, which states that obligations of member states under the Charter shall prevail over obligations under any other international agreements.³³ This conflict of obligations came before the European Court of First Instance, when Security Council resolutions that froze assets of alleged terrorists were claimed to violate European human rights norms.³⁴

In the case *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*,³⁵ the Court of First Instance of the European Communities rejected the applicants' arguments alleging breach of their right to make use of their property.³⁶ The court also rejected their arguments alleging a breach of their right to be heard by the Sanctions Committee established under Security Council resolution 1267.³⁷ On appeal, the Grand Chamber of the Court set aside the judgment of the Court of First Instance on September 3, 2008 and ordered the annulment of the European Council Regulation which

²⁸ *Id.* See also H.R.C. Res.5/1, U.N. Doc. A/HRC/RES/5/1 (June 18, 2007).

²⁹ Advisory Committee, *supra* note 26.

³⁰ LAW AND PRACTICE, *supra* note 10, at 449.

³¹ G.A. Res. 61/106, U.N. Doc. A/Res/61/106 (Jan. 24, 2007).

³² See Committee on the Rights of Persons with Disabilities Home Page, <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> (last visited Jan. 29, 2010). See also Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 34, U.N. Doc. A/Res/61/106 (Jan. 24, 2007).

³³ LAW AND PRACTICE, *supra* note 10, at 472, 474.

³⁴ *Id.* at 472–79. See Case T-306/01, *Yusuf v. Council*, 2005 E.C.R. II-3533, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001A0306:EN:HTML>.

³⁵ *Yusuf*, 2005 E.C.R. II-3533. The appeal and its outcome is not mentioned in the book.

³⁶ *Id.* ¶ 284.

³⁷ *Id.* ¶ 331.

imposed certain specific restrictive measures directed against certain persons and entities associated with the al-Qaeda network and the Taliban.³⁸

The chapter in *Law and Practice* on humanitarian assistance shows the rapid development of this form of assistance through a proliferation of inter-governmental and non-governmental organizations as well as a wide range of U.N. agencies.³⁹ The editors correctly observe that “[a]s the humanitarian operations . . . have become more complex, various attempts have been made to rationalize the institutions and procedures that respond to natural and manmade disasters”⁴⁰ and they refer to guiding principles on the strengthening of the coordination of humanitarian emergency assistance.⁴¹ The chapter recognizes that a large international presence providing humanitarian and development assistance may have a perverse effect on the local economy.⁴²

The concern by Professor McGuinness that *Secretary or General?* contains little discussion of U.N. administrative reform in the direction of increased transparency and accountability has been dealt with extensively in part four of the book.⁴³ Chapter fifteen gives a theoretical interpretation over the immunity and responsibility of the U.N. It cites the relevant instruments, such as the General Convention of 1946⁴⁴ and the very important advisory opinion by the International Court of Justice in the case *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.⁴⁵

The editors observe that immunity is a very powerful tool that may be easily abused.⁴⁶ Indeed, even within the Secretariat some senior officials do not shy away from infringing Articles 101 and 105 of the U.N. Charter, which form the basis of the international civil service. They simply rely on the maximum “immunity leads to impunity.”⁴⁷

³⁸ Joined Cases C-402/05 P and C-415/05 P, *Kadi & Al Barakaat v. Council of the European Union*, ¶ 380, 2008 3 C.M.L.R. 41, available at http://www.carteruck.com/Documents/KADI_-_ECJ_JUDGEMENT03092008.pdf.

³⁹ See LAW AND PRACTICE, *supra* note 10, at 480–509.

⁴⁰ *Id.* at 482–83. See also G.A. Res. 46/182, U.N. Doc. A/RES/46/182 (Dec. 19, 1991).

⁴¹ LAW AND PRACTICE, *supra* note 10, at 482.

⁴² *Id.* at 504.

⁴³ McGuinness, *supra* note 2, at 935.

⁴⁴ LAW AND PRACTICE, *supra* note 10, at 515.

⁴⁵ *Id.* at 524.

⁴⁶ *Id.* at 521.

⁴⁷ See the decision by the Federal Appeals Court for the 2nd Circuit in *Van Aggelen v. U.N.*, 311 Fed. Appx. 407 (2d Cir. 2009), where a physically handicapped staff member, who had worked for the human rights department of the U.N., was denied due process of law because of total immunity of OHCHR’s senior officials. The office requested separation of service of the incumbent because he had won a case at the U.N. administrative tribunal in 2003.

The introduction to the draft articles on the Responsibility of International Organizations in chapter fifteen of *Law and Practice* could have been more substantive as the Special Rapporteur has already presented seven reports on the issue.⁴⁸

Chapter sixteen considers “Accountability in Practice.” This chapter deals with the sometimes blatant abuses in peace-keeping operations and sexual exploitation by U.N. peacekeepers, which are correctly singled out in subsection four. It should be recalled that a former member of the Sub-Commission had been entrusted in 2002 with a study on “activities and accountabilities of armed forces, United Nations civilian police, international civil servants and experts taking part in peace support operations.”⁴⁹ She produced a number of reports but could not finalize the study because the Sub-Commission was dissolved in 2006 and, despite her request made during the last session of the Sub-Commission, she was not allowed to submit the study to the new Advisory Committee.⁵⁰

The last chapter of *Law and Practice* begs the question whether the reform of the U.N. should take place primarily in the structures, procedures, and personnel that make up the U.N., or in the willingness of member states to use them. The U.N. Charter has many characteristics—as the editors also

⁴⁸ LAW AND PRACTICE, *supra* note 10, at 535. See also U.N. Int'l Law Comm'n, Special Rapporteur, *First Report on Responsibility of International Organizations*, U.N. Doc. A/CN.4/532 (Mar. 26, 2003) (prepared by Giorgio Gaja); U.N. Int'l Law Comm'n, Special Rapporteur, *Second Report on Responsibility of International Organizations*, U.N. Doc. A/CN.4/541 (Apr. 2, 2004) (prepared by Giorgio Gaja); U.N. Int'l Law Comm'n, Special Rapporteur, *Third Report on Responsibility of International Organizations*, U.N. Doc. A/CN.4/553 (May 13, 2003) (prepared by Giorgio Gaja); U.N. Int'l Law Comm'n, Special Rapporteur, *Fourth Report on Responsibility of International Organizations*, U.N. Doc. A/CN.4/564/Add.1 (Apr. 12, 2003) (prepared by Giorgio Gaja); U.N. Int'l Law Comm'n, Special Rapporteur, *Fourth Report on Responsibility of International Organizations*, U.N. Doc. A/CN.4/564/Add.2 (Apr. 20, 2006) (prepared by Giorgio Gaja); U.N. Int'l Law Comm'n, Special Rapporteur, *Fifth Report on Responsibility of International Organizations*, U.N. Doc. A/CN.4/583 (May 2, 2007) (prepared by Giorgio Gaja); U.N. Int'l Law Comm'n, Special Rapporteur, *Sixth Report on Responsibility of International Organizations*, U.N. Doc. A/CN.4/597 (Apr. 1, 2008) (prepared by Giorgio Gaja); U.N. Int'l Law Comm'n, Special Rapporteur, *Seventh Report on Responsibility of International Organizations*, U.N. Doc. A/CN.4/610 (Mar. 27, 2009) (prepared by Giorgio Gaja).

⁴⁹ See U.N. Econ. & Soc. Council, Sub-Comm'n on the Promotion and Protection of Human Rights, *Administration of Justice, Rule of Law and Democracy*, U.N. Doc. E/CN.4/Sub.2/2002/6 (July 30, 2002) (prepared by Françoise Hampson).

⁵⁰ See U.N. Econ. & Soc. Council, Sub-Comm'n on the Promotion and Protection of Human Rights, *Administration of Justice, Rule of Law and Democracy*, U.N. Doc. E/CN.4/Sub.2/2005/14 (June 21, 2005) (prepared by Françoise Hampson & Ibrahim Salama); U.N. Econ. & Soc. Council, Sub-Comm'n on the Promotion and Protection of Human Rights, *Other Matters: Second International Decade of the World's Indigenous People*, U.N. Doc. E/CN.4/Sub.2/AC.4/2006/3 (May 5, 2006).

explain in their introduction—of a constitution.⁵¹ Although Articles 108 and 109 provide for procedures to amend the Charter, like most constitutions, it will be difficult to amend.⁵² Moreover, a possible amendment faces the constraints of membership of the Security Council and the veto power of its members.⁵³

In 1993, the General Assembly established a working group, open to all members of the U.N., to consider adequate reform, including the question of increasing Security Council membership.⁵⁴ This reform process should reflect the political situation at the beginning of the twenty-first century. In 2010, there is still no agreement on an appropriate formula due to competing national interests and geographical distribution. In jest the working group is called the “never ending working group.”

Finally, *Law and Practice* provides the text of a number of speeches by statesmen on visions of the future of the U.N.⁵⁵ In comparison to previous Secretaries-General, Mr. Annan definitely championed reform, but much has still to be accomplished.⁵⁶ In addition, nothing can be expected from the current Secretary-General. The Millennium Summit in 2000 and the September 2005 Summit have also inspired reform. However, the requirements to amend the Charter, as contained in Articles 108 and 109, are so difficult to fulfill that it will take many years to come to realize a possible amendment.

In conclusion, *Law and Practice* is a very useful tool, not only for academics and students, but also for legal practitioners.

⁵¹ LAW AND PRACTICE, *supra* note 10, at 4, 567.

⁵² *Id.* at 567.

⁵³ *See id.* at 568.

⁵⁴ G.A. Res. 48/162, U.N. Doc. A/Res/48/162 (Dec. 20, 1993).

⁵⁵ LAW AND PRACTICE, *supra* note 10, at 583–96.

⁵⁶ *See* The Secretary-General, *Report of the Secretary-General on Renewing the United Nations: A Programme for Reform*, U.N. Doc. A/51/950 (July 14, 1997); The Secretary-General, *Report of the Secretary-General on Strengthening of the United Nations: An Agenda for Further Change*, U.N. Doc. A/57/387 (Sept. 9, 2002); The Secretary-General, *High-Level Panel on Threats, Challenges and Change, Report of the Secretary-General*, U.N. Doc. A/59/565 (Dec. 2, 2004); The Secretary-General, *Report of the Secretary-General: In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc. A/59/2005 (Mar. 21, 2005); The Secretary-General, *Report of the Secretary-General on the Activities of the Office of Internal Oversight Services*, U.N. Doc. A/60/682 (Feb. 17, 2006). Some reports are excerpted in the book.