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Review Essay *Quis judicabit?* The Security Council, Its Powers and Its Legal Control

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With a metaphor that, like most metaphors, is not altogether accurate, the UN Security Council could be described as a whale which, for reasons known and unknown, lay quietly somewhere on the high seas for most of its life. Some ten years ago, the whale awoke and turned over once or twice, sending waves to distant shores which, in turn, set in motion the ships and boats and canoes of legal science. They are still nervously cruising while the whale, as it turned out, did not really leave its place.

In the years after 1990, the activism the Security Council demonstrated for the first time in its history gave rise to the question whether the body's powers under Chapter VII of the UN Charter are virtually unlimited, how far the Council can extend the scope of its activities, and whether there are sufficient means of legal control. In a foreword introducing one of the books reviewed in this essay,¹ Judge Rosalyn Higgins phrased this question in the following way:

What are the limits to institutional creativity? What deviations from what was intended in the Charter are to be regarded as lawful, imaginative adaptations to contemporary needs? And

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¹ Fraas, Michael. *Sicherheitsrat der Vereinten Nationen und Internationaler Gerichtshof: Die Rechtmässigkeitssprüfung von Beschlüssen des Sicherheitsrats der Vereinten Nationen im Rahmen des VII. Kapitels der Charta durch den Internationalen Gerichtshof*. Frankfurt am Main: Peter Lang, 1998. Pp. lx, 258. DM 98.

Herbst, Jochen. *Rechtskontrolle des UN-Sicherheitsrates*. Frankfurt am Main: Peter Lang, 1999. Pp. 449. DM 128.

Lailach, Martin. *Die Wahrung des Weltfriedens und der internationalen Sicherheit als Aufgabe des Sicherheitsrates der Vereinten Nationen*. Berlin: Duncker & Humblot, 1998. Pp. 349. DM 112.

Stein, Andreas. *Der Sicherheitsrat der Vereinten Nationen und die Rule of Law: Auslegung und Rechtsfortbildung des Begriffs der Friedensbedrohung bei humanitären Interventionen auf der Grundlage des Kapitels VII der Charta der Vereinten Nationen*. Baden-Baden: Nomos Verlagsgesellschaft, 1999. Pp. xiv, 423. DM 72.

Sarooshi, Danesh. *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*. Oxford: Clarendon Press, 1999. Pp. xxii, 311. £60.

what are to be regarded as going that step too far to be consistent with legality, and as *ultra vires*?²

Lawyers — international lawyers not excluded — tend to see danger where there is action, and rescue in the form of definitions and court proceedings. These are also offered, and proposed, in these books. But, as we know by now, the new universal leviathan did not emerge, and it is highly unlikely that it will emerge in the foreseeable future. The Kosovo conflict has left behind a Council with a shattered authority, and the unwillingness and inability of the member states of the UN to agree on a reform of the Council's membership and voting procedures³ increasingly casts doubt upon the legitimacy of a body the UN Charter established as the primary guardian of international peace and security. Even if one leaves the present situation out of consideration, a balance of its activities in the last ten years hardly makes the Security Council appear as a danger to the international rule of law or the independence of states. Some measures which have excited lawyers so much, like the establishment of the tribunals for the former Yugoslavia and for Rwanda, resulted from a feeling of member states sitting on the Council that in order to save their, and the Council's, face something had to be done if that what really needed to be done could not be done because of lacking unanimity between the permanent members. Other measures criticized as possibly unlawful reflect a late acknowledgement of new realities in international life. The Council's intervention in civil wars, for instance, only recognizes that such wars, the way they are led today, regularly threaten the political stability and the peace of an entire region, and constitute a source of human suffering of a degree unknown to most inner-state conflicts of the past. By considering such wars as coming under its mandate the Council reinforces and intensifies the interest the international community has taken in armed conflicts not of an international character in the age of the United Nations — an interest particularly expressed in the common Article 3 of the 1949 Geneva Conventions and the 1977 Protocol (II) relating to the protection of victims of non-international armed conflicts. At the end of the twentieth century, the world clearly requires an exercise of more, not less authority on a global level; and international lawyers, this reviewer believes, should encourage this development rather than warn against it. For the alternative is either inertia or unilateral action taken by a state or group of states without assuring the target state and the general membership of the international community of that minimum of participation and procedural justice which is characteristic of the decision-making process of the Security Council.

In light of this, it is with somewhat mixed feelings that one encounters (in the aftermath of many articles) books, conceived a few years ago, the titles of which suggest that they too are devoted to the task of constraining the Security Council and strengthening its judicial control. Isn't it a deplorably weak Gulliver, lying on the ground not by choice, whom they want to tie up with their lawyerly bands and

² In Sarooshi, *supra* note 1, at xi.

³ See e.g. Fassbender, 'Reforming the United Nations', *Contemporary Review* 272 (1998) 281–90. Slightly expanded version in 73 *Die Friedens-Warte* (1998) 427–42.

strings? On the whole, this fear proves unfounded. The authors of the books under review generally approve of the greater role in world affairs the Council has assumed since the end of the confrontation of East and West, the responsibilities it has taken on in a difficult and by no means linear process of a belated realignment with a world so different from that of 1945. It is with great care and prudence that the authors ponder over ways how this new role of the Council can be reconciled with the idea, and necessity, of the rule of law in international relations. Moreover, the issue of what today constitutes a legitimate interest of the international community or, in the opposite perspective, the present scope of the *domaine réservé* of states, is worth contemplating irrespective of the condition of the Security Council as one, but not the only possible body through which the community may act in the future.

All the books to be reviewed here are dissertations submitted to Faculties of Law of German universities (Passau, Würzburg, Göttingen and Hamburg), or, in the case of Danesh Sarooshi's study, the London School of Economics and Political Science. With the exception of the latter, to which I will return in a minute,⁴ the books cover about the same ground. They focus on a discussion of the extent to which the Security Council is subject to law, and an interpretation of Article 39 of the UN Charter, in order to define the limits of lawful Security Council action. This interpretation invariably includes a discussion of interpretive methods applicable to the Charter and a review of the practice of the Council regarding threats to, or breaches of, international peace in the last 50 years. While Jochen Herbst has devoted almost all his pages to this central issue, the other authors take it as a starting point from which they explore different parts of the surrounding area. Michael Fraas considers in detail the possibilities of a judicial review of Chapter VII decisions by the International Court of Justice. In his and in Herbst's book the *Lockerbie* case plays an important role. Martin Lailach ventures on a comprehensive redefinition of the phrases 'international peace' and 'international security' as used in Article 24, paragraph 1, and Article 39 of the UN Charter. Andreas Stein examines the legality of 'humanitarian interventions' of the Security Council in the light of a 'concept of rule of law' which he understands as an integrative part of the UN system.

Some principal conclusions to which the authors have come may be summarized as follows:

1. *The Security Council and international law.* Herbst regards the Council as bound by the UN Charter and general international law. Stein only mentions the Charter; to him, the respective obligation of the Council results from the fact that the system established by the Charter is governed by a 'rule of law' ('the rule of law which according to an emerging consensus in legal science as well as in state practice . . . is to be the governing principle of international relations', p. 393). According to Fraas, the Council must respect the Charter, *jus cogens*, and those human rights states parties to

⁴ See *infra*.

the International Covenant on Civil and Political Rights cannot derogate in time of public emergency (see Article 4 of the Covenant).

2. *Interpretation of Article 39 of the UN Charter.* Herbst concludes: ‘The determination of a threat to the peace . . . presents primarily a factual question left to the discretion of the Security Council alone. This discretion remains, however, contingent on and thus limited by the purposes and principles of the UN Charter . . . A threat to the peace may also result from a breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, or from the international trade in drugs’ (p. 416 *et seq.*). Stein holds that a threat to the peace requires an ‘intensified danger to peace’ understood as absence of military conflict between states. ‘A violation of a humanitarian minimum standard in a state can justify military action by the Security Council only if there is a grave and imminent danger of an outbreak of an armed interstate conflict’ (p. 160).⁵ The author acknowledges, however, ‘wide discretionary powers of the Security Council in assessing a factual situation with regard to its potential impact on international peace and security’ (p. 393). In contrast, Lailach emphasizes in strong words that ‘the notion “international peace and security” [in Article 24 of the Charter] comprises the absence of international armed conflicts *and of large-scale, man-made human suffering*’ (p. 307).⁶

International peace as the absence of large-scale, man-made human suffering is broken in case of acts of genocide, torture, slavery, systematic rape of women, massive discrimination for racial or other reasons, ‘ethnic cleansing’ or other instances of expulsion, the obstruction of humanitarian assistance, and acts of a similar nature. In all of these examples, international peace is broken when the cases are not of a solitary, but numerous and massive, systematic nature (p. 305).

Accordingly, Lailach considers an intervention of the Council on the basis of Article 39 of the Charter as lawful even if the human suffering characterized above has not led to a concrete danger of an international armed conflict (p. 206).⁷ Rather laconic is Fraas’s judgment: ‘Because of the breadth and flexibility of the concept of “threat to the peace”, the Security Council has a wide discretion when appreciating whether the requirements for its actions are fulfilled. In this regard, judicial review is limited to a control of abuse . . . The Security Council’s discretion is limited by the principle of good faith, the sovereignty of member states, the principle of proportionality, the fundamental human rights and *jus cogens*’ (p. 256, cf. pp. 243–47).

3. *Judicial review by the ICJ.* As this is Fraas’s main subject, I start with his conclusions:

The decisions of the Security Council (SC) are presumed to be legal. If this presumption is

⁵ Translation by the author of this review.

⁶ Emphasis added.

⁷ The author’s preceding remarks about the conditions necessary to qualify large-scale, man-made human suffering as a ‘threat to the peace’ (p. 205, cf. p. 302) obscure his central argument. He spends many pages explaining that not every such suffering may be characterized as a ‘threat to the peace’ because to him such a ‘threat’ presupposes a concrete danger of an international armed conflict. This opinion is hardly consistent with his broad definition of ‘international peace’, and it leads to the awkward result that large-scale, man-made human suffering always constitutes a ‘breach of the peace’ but not necessarily a ‘threat to the peace’.

rebutted, an illegal decision is void. As a general rule, it is for the SC itself to decide on the legality of its acts. However, UN member states have a right of last resort which entitles them to disregard an illegal act if the illegality is grave and obvious.

The SC and the ICJ exercise their competences independently. The principles of *lis pendens*, *connexity* and *res judicata* are not applicable to the relationship between the two organs. With regard to a possible distinction between legal and non-legal questions, there are no matters that are, by their nature, excluded from judicial review *a priori*. The relationship between the SC and the ICJ is characterized by functional parallelism. In the exercise of their competences both organs must act in consideration of each other's interest, and not impede each other in their action.

Judicial review of the legality of SC decisions is both possible under procedural law and permitted under constitutional law of the UN. There can be principal as well as incidental control. In contentious proceedings such control is only possible if the decision in question affects the legal relationship between the parties. The General Assembly and the SC have the right to request an advisory opinion on the legality of a SC decision . . . Because of the discretion granted to the SC when acting under Chapter VII of the Charter, the standard of judicial review is limited (p. 255 *et seq.*).

Herbst's findings are very similar (see pp. 401–9 and the summary on p. 417 *et seq.*). Both authors are sceptical of the practical importance of the mechanisms of judicial control presently available. Fraas mentions the requirement of ICJ jurisdiction in accordance with Article 36 of the ICJ Statute, and the low number of recognitions of compulsory jurisdiction under Article 36, paragraph 2. It will indeed be very rare that a state which sees itself unlawfully targeted by a Security Council decision will have a legal controversy with another state to which this decision is relevant; and it will be even rarer that there is a correspondence of the two states' subjection to the jurisdiction of the ICJ. What is more, the *Lockerbie* case has shown that even if all those requirements are fulfilled, judicial control of Security Council resolutions 'remains unlikely' (Herbst, p. 418). Fraas and Herbst do not consider the possibility of a control in the form of advisory opinions to be an efficient substitute: the Security Council will hardly challenge a resolution previously adopted by itself, and chances of gaining a majority in the General Assembly for a request of an advisory opinion (i.e. a vote of no confidence in a Council decision) will usually be slim. In accordance with their limitation to a discussion of what they regard as the law in force, neither of the two addresses the proposal to authorize the UN Secretary-General to request advisory opinions.⁸

Herbst has reservations about the idea of introducing a system of direct judicial review of Security Council decisions (see p. 411 *et seq.*), reservations I share in view of the present stage of development of the international community.⁹ Stein, on the other hand, is in favour of such direct review, and his arguments are notable. First, he points to a growing imbalance between the assessment of the powers of the Security Council

⁸ For this issue, see B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (1998) 314.

⁹ *Ibid.* at 309–11.

on the one hand, and that of the competence of the ICJ on the other hand: while most commentators today concede powers to the Council by far exceeding those conceived by the drafters of the Charter, they rigidly hold on to the original views about the role of the ICJ (p. 380). Conceptually, Stein supports a stronger judicial control of Security Council decisions as part of a ‘constitutionalization of the UN system’:

The notion of *Rechtsstaat* as an essential pillar of national constitutional theory including the idea of a separation of powers and a system of checks and balances can and should be made applicable to the UN constitutional order in a manner appropriate to its distinct structure and characteristics (p. 394).

However, the authors’ analysis of the discretion the Security Council enjoys when using its powers under Article 39 of the Charter shows clearly that an introduction of direct judicial review alone (for instance by an amendment of Chapter XIV) could not lead to a functioning legal control of the Council. It would have to be accompanied by a change in the standard of control the Court can apply to Council decisions. But every such change in the direction of a *Erhöhung der Kontrolldichte* (increase in the intensity of control), to use a German term of art, involves the risk of producing a Council too constrained, and too much afraid of a later repeal of its measures by the ICJ, to accomplish its tasks.

The authors are to be applauded for their careful and scrupulous treatment of the subject. It is a characteristic of German scholarship in international law to take into account a vast amount of literature, both contemporary and of the past, published in German, English and French. The reviewed books present the wide range of tenable interpretations of Article 39 of the Charter. They are evidence of the fact that the practice of the Council can be read in different ways. Thanks to the farsightedness of the founders of the UN the opening of Chapter VII is a text flexible enough to allow an adaptation of its meaning to changed needs and circumstances of international life.

This writer believes that Martin Lailach has made out a good case for a right of the Security Council to intervene in situations of large-scale, man-made human suffering irrespective of whether or not such a situation is of a transborder character. Lailach rightly argues that in the ‘hierarchy of values’ established by the UN Charter the prevention of extreme human suffering is of central importance (p. 237). As the impressive words of its preamble accentuate, it is ‘the dignity and worth of the human person’ which is the principal concern of the UN Charter. This concern must guide any interpretation of the instrument, and it renders indefensible a reading of Article 39 which acknowledges the existence of a breach of the peace if a bullet has crossed a border but not if genocide is committed within the borders of a ‘sovereign state’.

It is interesting to compare Lailach’s conclusion with the findings of Professor Matthias Herdegen of Bonn University, presented in a lecture of June 1998 about ‘the competence of the UN Security Council’ which is a masterly and balanced summary of most of the issues discussed in this essay.¹⁰ According to Professor Herdegen, the Security Council can recognize a threat to the peace beyond the case of the classical transborder conflict if there is a ‘physical threat to internationally protected values

¹⁰ M. Herdegen, *Die Befugnisse des UN-Sicherheitsrates: Aufgeklärter Absolutismus im Völkerrecht?* (1998).

and rights of high standing'.¹¹ When assessing a particular situation, the Council is supposed to consider, and to weigh, three (or rather four) different factors: (1) the rank of the threatened right or value in the international legal order, (2) the fact of how strongly this right or value is being endangered or violated, and (3) the transborder effects of the threat or violation.¹² A fourth factor is introduced a bit later, namely the place of the sovereign right of a state being affected by an intended action of the Security Council in a 'hierarchy of freedoms of states under international law'.¹³

This formula is both narrower and wider than Lailach's — narrower because Professor Herdegen still refers to a transborder quality of the situation in question, a quality which can only be disregarded if at least one of the two other factors is overwhelmingly significant (as in the case of genocide); and wider because Professor Herdegen considers the Council to be entitled to intervene not only in the case of man-made human suffering which is already existing, but also if there is a concrete danger of such suffering, for instance if scientific evidence suggests that a serious nuclear power station accident is looming.¹⁴

Together with the advantages the books share some of the less desirable features of the German tradition. They tend to be exhaustive in both meanings of the word. Often, the reader cannot see the wood for the trees. An overly fine subdivision of the text (see, e.g. in Herbst's book part III, chapter II, § 4, section II.1.b.dd.(9): The Failed State Phenomenon) does not really help the reader orient himself. For reasons difficult to understand, the authors feel they must start from scratch; everything is explained as if it were the very first book on the subject. Fraas, for instance, opens his study with an explanation of the idea of collective security and of the legal foundations of the ICJ. Stein devotes 50 pages to a retelling and rediscussion of the Somalia intervention.

Because every detail is addressed, and every old controversy retold, some decisive questions are considered too hastily. One of them is the relationship between the law of the UN Charter and 'general international law', an issue important both for the method of Charter interpretation and for determining the degree to which the Security Council is bound by 'international law'. Of the authors whose works are considered here, Andreas Stein comes closest to an answer. He attributes constitutional character to the Charter, and not just in the fairly banal sense that the Charter is the constitution of an international organization. He rather describes the instrument as the constitution of the international community (p. 78 *et seq.*).¹⁵ But not untypical of many authors who 'in principle' approve of this constitutional concept, he immediately steps back, explaining that the Charter is 'first of all, or at least at the same time' a multilateral treaty, and concluding that the Charter is 'a multilateral

¹¹ *Ibid.* at 15 ('eine physische Bedrohung völkerrechtlich geschützter Rechtsgüter von hohem Rang').

¹² *Ibid.* at 16.

¹³ *Ibid.* at 23.

¹⁴ *Ibid.* at 16 *et seq.*

¹⁵ According to Stein, this proposition has become a commonplace in the literature of international law (p. 78). This is true only in so far as the notion of the Charter being 'the international constitution' has made a certain career as a rhetorical figure. The number of authors taking the concept seriously and trying to apply it consistently to practical questions of the international legal order is still very limited.

treaty with a constitution-like character' (p. 80). It is not astonishing that this lukewarm characterization does not allow the author to arrive at any clear solution to the problem of Charter interpretation.

As mentioned before, Fraas considers the UN and, as its organ, the Security Council to be bound by general international law, in particular basic human rights guarantees and norms of *jus cogens* (pp. 82–4, 246).¹⁶ His reasoning as to *jus cogens* is as follows. The constituent treaty of an international organization, he says, may not contradict *jus cogens* rules. 'From this it follows that the organs of the organization may not be empowered to violate rules of *jus cogens*' (p. 77).¹⁷ As a statement of the law as it stands today, the two propositions are certainly true. With difficulties — the instrument antedates by far the category of *jus cogens* — one may even apply them to the UN Charter. But saying that the Charter may not contradict *jus cogens* (which it certainly does not) and may not empower an organ like the Security Council to violate such norms (which it does not either) does not explain why the Council, as the principal executive institution of the international community, should be bound by rules specifically addressed to states in their treaty-making capacity.

With regard to the perhaps most central rule of *jus cogens*, the prohibition of the use of force in international relations, Fraas suggests that it is generally binding on the Security Council, but that the Council may depart from it on the basis of Chapter VII of the Charter (p. 84). If this thesis means to require the Council, if it wishes to take action under Chapter VII, to comply not only with the provisions of that chapter but also with the international law governing the use of force between states, it is clearly at odds with the wording and the object and purpose of the Charter. If, in contrast, the thesis in fact establishes an exception to the rule as extended as the rule itself, it is meaningless.¹⁸

Herbst rejects the idea of the UN Charter being the constitution of the international community outright (p. 372 *et seq.*). To him, the Charter is simply one treaty among others, binding only on its parties, and to be interpreted according to the rules of general international law. Article 103 of the Charter is read in the narrowest possible way. The Security Council is said to be bound by general international law (without any differentiation between rules according to their contents and addressees) and *jus cogens*, whereas the concrete obligations deduced from this proposition (like the obligation to respect human rights and the right of peoples to self-determination) are mostly based on specific Charter rules. According to Herbst, an interpretation of a Charter provision conflicting with a peremptory norm as defined by Article 53 of the Vienna Convention on the Law of Treaties would render that provision void (p. 377).

¹⁶ See also Herdegen, *supra* note 10, at 27.

¹⁷ Translation by the author of this review.

¹⁸ For these reasons, I agree with Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?', 10 *EJIL* (1999) 517, at 546: 'The prohibition of the use of force ... is not binding on the Council acting under Chapter VII. Otherwise, the Council would be obliged to examine in the event of every international crisis whether one party has been a victim of an illegal use of force. Clearly, this would run counter to the conception of Chapter VII of the Charter, which does not require a legal evaluation of the positions of the parties.'

These views display a fundamental misunderstanding of the place of the UN Charter in the contemporary international legal order. It is a bit strange to see them reiterated in a particularly vehement way by an author who has analysed so carefully the practice of the Security Council, a practice strongly supporting a constitutional reading of the Charter. This is not the place once more to discuss, and to refute, these opinions. I have tried to do so elsewhere.¹⁹ Here it must suffice to say that all available evidence has made me conclude that the UN Charter was not conceived of as one more multilateral treaty operating within the framework of international law but as the constitution of an international political society within which international law would operate.²⁰ Accordingly, there is no room for a category of 'general international law' existing independently beside the Charter. Instead, the Charter is the supporting frame of all international law existing today and, at the same time, the highest layer in a hierarchy of norms of international law.²¹ Norms of *jus cogens*, which rest on the foundation of the Charter and could not be imagined without it, cannot be set against Charter provisions. From this it follows that the Security Council is bound by the law of the Charter alone. There is, however, a partial overlap between that constitutional law and *jus cogens* as a set of rules which places certain subjects beyond the reach of states when they, bilaterally or multilaterally, exercise their law-making function. The prohibitions of genocide, aggression, slavery and of trading in human beings, as well as the right of peoples to self-determination, belong to both categories of norms.²² The Security Council must observe these prohibitions in their form as Charter (constitutional) law, provided that the instrument, in particular its Chapter VII, does not exempt the Council.

The questions addressed in these books are not new. Apart from many law journal articles, a number of more recent monographs have made the terrain a rather safe ground.²³ Mohammed Bedjaoui's work²⁴ comes to mind, and, as contributions from Germany, the books written by Andreas F. Bauer,²⁵ Heike Gading,²⁶ Bernd Martenczuk²⁷ and Matthias Pape.²⁸ Of the older literature, the book by Joachim Arntz

¹⁹ See Fassbender, *supra* note 8, part 1, and *ibid.*, 'The United Nations Charter as Constitution of the International Community', 36 *Colum. J. Int'l L.* (1998) 529.

²⁰ The language is borrowed from Sir Humphrey Waldock, 'General Course on Public International Law', 106 *Recueil des Cours* (1962-II) 1, at 19.

²¹ For a more detailed discussion, see Fassbender, *supra* note 8, at 117–22, and *ibid.*, 'The UN Charter as Constitution', *supra* note 19, at 585–8.

²² See Fassbender, *supra* note 8, at 123–8, and *ibid.*, 'The UN Charter as Constitution', *supra* note 19, at 589–93.

²³ A particularly comprehensive bibliography is to be found in Fraas's book at xxv–lx.

²⁴ *The New World Order and the Security Council: Testing the Legality of Its Acts* (1994).

²⁵ *Effektivität und Legitimität: Die Entwicklung der Friedenssicherung durch Zwang nach Kapitel VII der Charta der Vereinten Nationen unter Berücksichtigung der neueren Praxis des Sicherheitsrats* (1996).

²⁶ *Der Schutz grundlegender Menschenrechte durch militärische Maßnahmen des Sicherheitsrates — das Ende staatlicher Souveränität?* (1996).

²⁷ *Rechtsbindung und Rechtskontrolle des Weltsicherheitsrats: Die Überprüfung nichtmilitärischer Zwangsmaßnahmen durch den Internationalen Gerichtshof* (1996). See also *ibid.*, *supra* note 18.

²⁸ *Humanitäre Intervention: Zur Bedeutung der Menschenrechte in den Vereinten Nationen* (1997). For a review, see Fassbender, 38 *Int'l Rev. Red Cross* (1998) 567–71.

about the notion of a threat to the peace²⁹ is important. Thus, the body of German writings of the last few years dealing with the subject of the competence and control of the Security Council is impressive. (It would be worthwhile thinking about the reasons for this particular German interest.)³⁰ Unfortunately, its impact on the international scholarly debate will be very limited. It is no secret that this discussion is primarily held in English, and that its main participants are authors of the English-speaking world, who nowadays rarely understand German. In consequence today, books in German dealing with the UN, or indeed any other subject of international law, receive attention almost only in Germany itself and its German-speaking neighbour states.³¹ How many readers will a monograph on the Security Council have? To be quite frank, the number will not exceed two dozen, to which one may add a few term-paper writing law students looking for a quotable statement. Does such a readership justify the time and effort a doctoral student typically devotes to writing his or her thesis? If German scholarship in international law wants to be heard and discussed in the community of international lawyers, it must adopt a language understood by a majority of the members of that community. German international law journals have already recognized this reality, which from a German point of view is as sad as the disappearance of German as an international means of communication in the natural sciences.³²

The subject of Danesh Sarooshi's impressive study is precisely stated in the book's subtitle: 'The Delegation by the UN Security Council of its Chapter VII Powers'. However, the 'delegation' the author describes is a phenomenon only resulting from his own perception of what the Security Council, without always saying so, in fact has done when including other UN organs or UN member states in the exercise of its powers under Chapter VII of the UN Charter. 'Delegation' is an umbrella notion allowing the author to understand a number of seemingly unconnected occurrences and practices as part of a larger, and perhaps even coherent, picture, and to subject them to a consistent legal regime — albeit one at least in part of his own making.

The author starts out with the observation that the Council, before and after the shift in world politics around 1990, has often sought to achieve its objectives by assigning certain tasks and powers to another UN organ or member state. Perhaps the most prominent and obvious example of this practice is Resolution 678 (1990) in

²⁹ *Der Begriff der Friedensbedrohung in Satzung und Praxis der Vereinten Nationen* (1975).

³⁰ Herdegen, *supra* note 10, at 39, refers to 'a longing of German jurisprudence, stronger than anywhere else in the world, for clear-cut and if possible also justiciable limits of competence'.

³¹ A case in point is the book by D. Sarooshi, published in the prestigious series 'Oxford Monographs in International Law' edited by Professor Ian Brownlie, which is reviewed in this essay (see *infra*). The comprehensive bibliography (pp. 287–305) includes a handful of French titles, but not a single publication in German.

³² Of the major journals, the *German Yearbook of International Law* (Kiel) (formerly the *Jahrbuch für Internationales Recht*) and the *Max Planck Yearbook on United Nations Law* (Heidelberg), which was newly founded in 1997, are exclusively published in English. The same is true for the *Austrian Review of International and European Law* (Vienna). The *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg), the *Archiv des Völkerrechts* (Hamburg) and the *Friedens-Warte* (Berlin) are partly published in English.

which member states cooperating with the Government of Kuwait were authorized 'to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area'. The reason for the practice is clearly the limitation of the Council's own military and financial resources, in particular the lack of armed forces provided for in Articles 43 and 45 of the Charter. Considering the various recourses the Council has had to UN organs and member states as individual cases of a delegation of Chapter VII powers, the author addresses the questions of 'whether the Security Council can delegate, to whom, under what conditions, and what limitations exist on the delegate in the exercise of Chapter VII powers' (p. 2). In a first chapter, the 'general legal framework governing the process of a delegation by the UN Security Council of its Chapter VII powers' is set out. The following two chapters deal with the delegation of powers to the UN Secretary-General and UN subsidiary organs, respectively. The author then turns towards the delegation of powers to UN member states (chapters 4 and 5) and regional arrangements (chapter 6). A delegation of powers in international institutions is defined by the author 'as taking place whenever an organ of an international organization which possesses an express or implied power under its constituent instrument conveys the exercise of this power to some other entity' (p. 4 *et seq.*):

A delegation of powers does not involve the transfer of a power *in toto*. Accordingly, the organ of an international organization which delegates a power does not *prima facie* denude itself of the right to exercise the power. This has two consequences. First, the delegation of power can always be revoked by the delegating organ. Second, when an organ delegates a power then it retains the right to exercise that power (p. 7).

It is, the author holds, important that the delegator expressly state its intention to delegate its powers. 'Accordingly, in the case of a delegation of Chapter VII powers by the Security Council, the only appropriate form for such a delegation is by means of a resolution' (p. 9).

The author distinguishes between a delegation of powers and an authorization of an entity to carry out a specified objective. An authorization is said to be more limited than a delegation of powers, 'both in terms of the specification of the objectives to be achieved and the qualitative nature of the powers transferred to achieve the designated object' (p. 12). However, in the case of an authorization by the Council of states to use force, the Council 'is not, in legal terms, simply making an authorization, but upon closer examination is in fact delegating to Member States its Chapter VII powers' (p. 13).

According to Sarooshi, the Security Council possesses a general competence to delegate its powers, although this is not provided for in express terms by the Charter. As a first main source of that competence he recognizes a general principle of law in the meaning of Article 38, paragraph 1(c), of the ICJ Statute, referring to the fact that 'constitutions of a large number of States, both from common and civil law systems, allow their organs of government to delegate powers' (p. 16). The second source of the competence is seen in the law of international institutions. 'It is contended that it is a general principle under the law of international institutions that a principal organ of

an international organization possesses a general competence to delegate certain of its powers to other entities' (p. 17).

The principal limitations of the general competence of delegation are also derived from a maxim recognized by the author as a general principle of law: *delegatus non potest delegare*. It is translated as follows: 'A discretionary authority must, in general, be exercised only by the authority to which it has been committed' (p. 21). With regard to the Security Council, the author states: 'The presumption is that the exercise of these powers should not be delegated to another entity. This is of particular importance to the Security Council due to the peculiar institutional characteristics of its decision-making process, especially the existence of the veto' (p. 25). The author makes out four specific restrictions which this 'non-delegation doctrine' imposes on the Council (p. 32 *et seq.*): (i) The Council is prohibited from delegating certain of its Chapter VII powers (in particular the determination that a threat to, or breach of, the peace has come into existence or has ceased to exist); (ii) The Council can only delegate broad powers of discretion subject to certain constraints; (iii) When powers are being delegated the limitations on the exercise of the power must be imposed on the delegate; and (iv) The terms of a Council resolution delegating Chapter VII powers are to be construed narrowly.

The book stands out from others for its imaginativeness and thoughtfulness, and the mastery of a vast and complex practice of the Security Council over more than 50 years. Danesh Saaroshi develops indeed no less than a 'theory of legitimate delegation', as Judge Higgins says in her foreword. The results at which the author arrives with regard to both: limitations of the Council when involving other UN organs or member states in a use of Chapter VII powers, and concrete problems arising from this involvement for the Council and the 'delegates', are appropriate and reasonable.

And yet, this reviewer is left with some doubts. First, the Security Council has never delegated the one real power it has under Chapter VII as long as it does not have its own armed forces at its disposal: the right to determine whether there is a threat to or breach of the peace. Second, when the Council 'makes recommendations' on what specific measures shall be taken (Article 39) or 'authorizes' someone else to take measures, does it really consider the addressee of its recommendations or authorization as a 'delegate' as defined by the author, i.e. someone holding in principle the same powers as the Council itself? Perhaps we are faced not with a delegate but with a mandatory as an entity holding a specific mandate.³³

Further, and perhaps even more importantly, I am not sure whether the 'general legal framework' on which the author's findings rest is convincingly constructed. Its cornerstones are two maxims the author considers to be general principles of law: (1)

³³ See Security Council Resolution 1264 (1999) of 15 September 1999 on the question of East Timor: 'The Security Council . . . Authorizes the establishment of a multinational force . . . with the following tasks: to restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance operations, and *authorizes* the States participating in the multinational force to take all necessary measures to fulfil this mandate.'

organs of government are entitled to delegate powers, and (2) *delegatus non potest delegare*. I have no difficulties in referring to general principles of international law for the interpretation of the UN Charter, because the Charter has incorporated such principles together with certain rules of customary international law.³⁴ In my own work, I have suggested that the rule of *Nemo debet esse iudex in propria sua causa* is relevant to the issue of Charter reform in that it is suggesting a certain modification of the veto power of the permanent members of the Security Council.³⁵

However, the status in international law of the two maxims applied by Sarooshi is not entirely clear. There is evidence that they play (though with a great many variations and exceptions) a role in the domestic law of a number of states, but in the realm of international law the author cannot refer to much else than the case of *Meroni v. High Authority* of 1958, where the European Court of Justice found that the High Authority of the European Coal and Steel Community could delegate certain of its powers under the founding treaty even where the treaty did not expressly provide for such a delegation (see p. 17). As regards the second maxim prohibiting a delegate further to delegate his power, the author does not take it literally but rather turns it into its opposite by claiming that it only limits a general power of delegation based on the first maxim. In order to apply the second maxim to the Security Council, the author feels compelled to prove that the Council itself is a true delegate: 'States did possess an international police power prior to the UN Charter and thus ... Article 24(1) represents a delegation of this type of power by States to the Council' (p. 30 f.). This is not persuasive because, as the author reluctantly seems to admit himself (p. 28 n. 108), there was before the Charter no right of states 'to maintain or restore international peace and security' analogous to that the Security Council enjoys under Articles 24 and 39 of the Charter.

At one point, in footnote 69 of his first chapter, the author quotes Hans Kelsen: 'No organ can legally delegate power to another organ without being authorised by the constitution to do so.' It's a sentence from Kelsen's *The Law of the United Nations* of 1951, this admirable and broad-minded work which anticipated many later developments of fundamental importance. It seems to me that this statement would have provided the right point of departure of Sarooshi's study: a recognition first of the Charter as the constitution of the international community, second of the Security Council as an organ of that community established by the constitution,³⁶ and third of the proposition (well-founded, it seems, on the basis of a comparative analysis of

³⁴ For the concept of incorporation, see Fassbender, *supra* note 8, at 117–23, and *ibid.*, 'The United Nations Charter as Constitution', *supra* note 19, at 585–9.

³⁵ See Fassbender, *supra* note 8, at 328–32.

³⁶ See H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1951), at 280 *et seq.*: 'As an organ of the United Nations the Security Council acts on behalf of the United Nations, not on behalf of its Members ... Acts of the Council ... are ... to be imputed to the Organisation, not to its Members. To disregard this imputation to the Organisation to make the Organisation disappear behind its Members is the tendency of the sovereignty-dogma which is incompatible with the idea of a legal order binding upon the states ... It is not the Members, it is the Charter which confers responsibilities on the Security Council.' See also Delbrück, 'Commentary on Art. 24', in B. Simma (ed.), *The Charter of the United Nations* (1994), 397, at 404.

existing constitutions of states and similar legal communities) that in the absence of an express or implicit authorization by the constitution an organ is not entitled to delegate its power to another organ or entity. The next task would then have been to interpret the UN Charter in order to determine the existence, possible scope and limitations of such an authorization, taking into account the Charter's singularity as well as its affinity to other constitutional documents.

In the last years, the Security Council has received a considerable amount of attention from international lawyers. To return to the questionable metaphor above, we now know — from a legal point of view — the whale better than ever before. The many publications, not only those reviewed on these pages, demonstrate a broad agreement to the effect that the different post-1990 ventures of the Council into the previously unknown have been well within the limits of its powers under the Charter. Legally, the Council is well equipped to carry out its mandate of safeguarding international peace and security even in the face of new dangers and constellations. At the same time, the present structure and possibilities of political and legal control of the Council's conduct do not seem to be out of all proportion to the needs of the international community and the action the Council can take under the prevailing circumstances. It is up to the members of the international community to decide whether they want to enable the Council to perform its functions or whether they wish gradually to return to pre-Charter habits and practices.