

Book Reviews

Jochen Abr. Frowein/ Klaus Scharioth/ Ingo Winkelmann/ Rüdiger Wolfrum (eds): *Verhandeln für den Frieden – Negotiating for Peace Liber Amicorum Tono Eitel*

Springer-Verlag, 2003, XIII + 866 pages

It is unusual for a career diplomat to be honoured with a *Festschrift*. But then *Tono Eitel* is no ordinary diplomat, having had an exceptional career. As personal assistant to Egon Bahr in the late sixties and early seventies, he became intimately involved in the negotiations leading to the Moscow Treaty and to the *Grundlagenvertrag*, milestones in Willy Brandt's *Ostpolitik*. In the early eighties, he headed the German delegation at the United Nations Law of the Sea Conference. Ten years later, he became Head of the Legal Department of the *Auswärtiges Amt*, following in the footsteps of Hermann Mosler and Carl-August Fleischhauer, who were later elected to the ICJ. As Legal Adviser, *Tono Eitel* drew on his knowledge of the law as well as on his considerable political skills and instinct to advise the German Government on issues of public international law. During this time he was made an Honorary Professor at Bochum University.

In 1995, he was appointed Germany's Permanent Representative to the United Nations, a position he held until his retirement in 1998. He assumed the rotating Presidency of the United Nations Security Council during Germany's non-permanent membership of that body in 1995/1996.

Tono Eitel continues to serve the German Government in various capacities, notably as the Commissioner for the return of cultural objects displaced during World War II and Occupation. He also played a significant role in the campaign for the election of Bruno Simma to the ICJ in 2002.

The *Festschrift* is divided into four parts: "United Nations", "International Treaty Law – International Law of the Environment – Interna-

tional Courts”, “Law of the Sea”, and “EU Law, Constitutional Law, German Reunification”. The collection of essays – roughly one half written in English, the other half in German – thus reflects *Tono Eitel’s* career as a lawyer and a diplomat. The reader will find a stimulating mix of essays by academics and practitioners on themes central to current international law and United Nations law.

Many of the essays were written under the impression of the events of 11 September 2001 and the Iraq crisis of 2002/2003. In fact, “September 11” and the Iraq crisis are the underlying themes in no less than ten of the essays, demonstrating the profound impact these events have had (and continue to have) on the use of force under international law and on the role of the United Nations Security Council.

In *“Effectiveness and Legitimacy of the United Nations Security Council”*, Celso Amorim gives us a first-hand account of the debate on Security Council reform. That debate has reached a practical standstill, with little hope of progress under the present generally ambivalent attitude of the United States towards the United Nations. It comes as no surprise that Amorim argues for a stronger role for the United Nations Security Council, whose legitimacy would have to be enhanced by a more equitable geographical representation.

United Nations reform is also the theme of Ingo Winkelmann’s contribution *“Das Postulat einer stärkeren Beteiligung des Südens am Sicherheitsrat der Vereinten Nationen”*. Over the years, Germany has been one of the foremost advocates for a Security Council that is both more efficient and representative of today’s international community, not least because of her (Germany’s) own aspirations towards permanent member status. Winkelmann is of the opinion that the call for a European seat on the Council is “under the present circumstances neither helpful nor realistic”. Rather, Germany’s (and the EU’s) focus should be on a European “bench” comprising more permanent European Member States than the present two. Winkelmann’s scepticism has received new nourishment from the recent Iraq crisis, where the rift between the EU Member States presently on the Council (the United Kingdom and Spain on the one hand, France and Germany on the other) was all too apparent.

Approaching the subject from another angle, Christian Tomuschat *“Die Europäische Union als ein Akteur in den internationalen Beziehungen”* reaches the same conclusion: the United Nations will remain for the foreseeable future an assembly of states, and nobody in the United Nations will be inclined to elevate the EU to membership

status. One might add that “nobody in the United Nations” includes at least some of the EU members themselves: the UK’s Foreign Minister Jack Straw stating very clearly in a speech as recently as 19 May 2003 that “the UN is and will remain an association of sovereign nation states”. Tomuschat makes a number of practical suggestions how, in his view, and in the context of the planned EU reform, the Union could assume a stronger role as a “player” in international relations: a clear-cut legal personality, an improved decision-making process and joint overseas representations.

The EU’s role within the United Nations is also the theme of “*Die Gemeinsame Außen- und Sicherheitspolitik (GASP) der Europäischen Union im Rahmen der Vereinten Nationen*” by Ernst Sucharipa, who, as Austria’s former Permanent Representative to the United Nations, gives a first-hand account on how CFSP “works” in New York and where its limits lie.

The legal bases for the use of force in international relations are the focus of Jost Delbrück’s contribution entitled “*Right v. Might – Great Power Leadership in the Organized International Community of States and the Rule of Law*”. Delbrück traces the role of the Great Powers back to the classical period of the international system, thus putting into perspective the concept and philosophy underlying the UN Charter, which is based on the power substrate of the Great Powers represented in the Security Council. Delbrück maintains that the legal foundations of the peace order established by the UN Charter has survived the chain of cases of deviant state practice by the Great Powers and other states. Faced with the present unilateralist approach of the United States, however, a United Nations based order has come under threat. Delbrück calls for the full commitment of those Member States possessing the necessary resources and potential. He concludes: what is needed is “good leadership *under* law, not *above* the law”.

The various threats posed to the contemporary legal order are also the subject of Nabil Elaraby’s “*Some Reflections on the Role of the Security Council and the Prohibition of the Use of Force in International Relations: Article 2 (4) Revisited in Light of Recent Developments*”. Elaraby is an advocate of a restrictive interpretation of Article 51 of the UN Charter, calling into question the concepts of “anticipatory self-defence” and “pre-emption”. Elaraby is also critical of a Security Council exceeding its competencies: the problem confronting the international community at present is “how to inject limitations on the Security Council’s freedom of action”. Elaraby calls for the introduction of a degree of judicial review of the actions of the Security Council in or-

der to ensure that the vast powers vested in the Council are carried out in conformity with the principles of international law. However, the determination of the existence of a threat to the peace should remain the sole prerogative of the Council, a political determination which by its nature is not justiciable.

Thomas Franck examines the question “*Is the U.N. Charter a Constitution?*” In his view, four characteristics of the Charter, namely “perpetuity, indelibility, primacy, and institutional autochthony” make it more proximate to a constitution than to an ordinary treaty. Franck makes the point that this is not simply an academic question. As a constitution, the Charter should be read broadly so as to advance, rather than encumber, its institutional ability to accomplish the purposes for which it was created. Being a “living tree”, a constitution develops its own customary law of interpretation, contributing to the ability of the Organization to continue to reinvent itself in the face of new challenges.

The issue of interpretation, this time of Security Council resolutions, is also addressed by Jochen Abr. Frowein in “*Issues of Legitimacy around the United Nations Security Council*”. Citing Resolutions 1154 (1998) and 1441 (2002) on Iraq, Frowein criticizes the Security Council for adopting resolutions to which, from the very beginning, different interpretations were put forward as to the justification of the use of force. Indeed, one might add, these resolutions – in particular Resolution 1441 (2002) – were only adopted *because* they were open to different interpretations. Frowein points out that the danger created by unilateral interpretation of Security Council resolutions in the most important area of use of force should not be underestimated, as this constitutes a real threat to the legitimacy of the Security Council. Another issue of legitimacy surrounding the Security Council about which Frowein has serious misgivings is the adoption of Resolution 1422 (2002), which requests the ICC, initially for a period of one year, not to commence or proceed with the investigation or the prosecution of any case concerning officials or personnel of United Nations operations from a state not a party to the Rome Statute. Frowein sides with those states which during the debates in the Security Council, expressed doubts whether this is a resolution within the framework of Chapter VII of the UN Charter and calls the resolution “an extremely dubious decision”.

This view is echoed by Claudia Fritsche “*Security Council Resolution 1422: Peacekeeping and the International Criminal Court*” and by Andreas Zimmermann “*Acting under Chapter VII (...) – Resolution 1422 and Possible Limits of the Powers of the Security Council*”. Ac-

cording to Fritsche, the greatest casualties of Resolution 1422 are the credibility of the Security Council and of peace-keeping operations. Zimmermann, who points to the fact that a first attempt (by France) to exclude Security Council mandated operations from the jurisdiction of the ICC had already been made during the drafting of the Rome Statute, refers to the many critical statements, both by United Nations Member States and by the United Nations Secretary-General during the discussions leading to the adoption of Resolution 1422. Both Fritsche and Zimmermann express their hope that Resolution 1422 will not be renewed when it comes up for review in the summer of 2003 (Resolution 1487 was passed on 12 June 2003. However, in contrast to Resolution 1422, it was not passed unanimously).

While the ICC, according to article 5 of the Rome Statute, does have jurisdiction over the crime of aggression, it cannot yet *exercise* this jurisdiction. Gerd Westdickenberg and Oliver Fixson, in their essay "*Das Verbrechen der Aggression im Römischen Statut des Internationalen Strafgerichtshofes*", draw on their intimate involvement in the negotiations and discussions over the years to give an in-depth analysis of the problems of defining this particular crime and of setting out the conditions under which the Court should exercise its jurisdiction. The authors call for a realistic approach in trying to seek a consensus by the year 2009, when the first Review Conference of the States Parties to the Rome Statute is to take place. As Westdickenberg and Fixson point out, considerable restraint should be exercised in defining the crime of aggression not least in order to protect the Court's functioning and integrity.

International Humanitarian Law and the fight against international terrorism are the focus of contributions by Dieter Fleck, Wolff Heintschel von Heinegg, Thomas Mensah and Rüdiger Wolfrum. While admitting that major questions remain unanswered or disputed, Fleck ("*Humanitarian Protection Against Non-State Actors*") maintains that there is no need to revise the laws of war in light of September 11. Heintschel von Heinegg ("*Das maritime ius in bello im 21. Jahrhundert*"), on the other hand, foresees a development that could lead to major changes in the Law of Maritime Warfare, caused by various "asymmetries" (actors, technologies, applicable laws). Mensah ("*Suppression of Terrorism at Sea: Developments in the Wake of the Events of 11 September 2001*"), in reviewing the various initiatives in strengthening the fight against terrorism at sea, argues that it is essential that the legitimate interests of flag states, coastal and port states, shipping and cargo interests, and the fundamental human rights of persons on board

a ship or interested in its operation are not unduly compromised as a result of these initiatives.

Wolfrum examines the various actions mandated by the Security Council in the fight against terrorism and their impact on the Law of the Sea. In "*Fighting Terrorism at Sea: Options and Limitations under International Law*" he points out that these actions, such as the maritime interdiction operations in the framework of the US-led Operation "Enduring Freedom", are designed to deal with a particular situation only, and that they may not be sustainable over the long term. What is needed is a comprehensive agreement which allows for the inspection of goods transported by sea and their monitoring without unduly burdening shipping, as well as improved possibilities to investigate ships on the high seas and within the exclusive economic zones if there is a sustained suspicion that they may support terrorist activities. In an interesting aside, Wolfrum is critical of a Standing Order of the German Ministry of Defence, according to which the German Navy may not pursue pirate vessels – not even on the high seas – nor may they free a merchant ship already under the control of pirates. The author argues that this restriction is neither compatible with Germany's obligations under the Law of the Sea, nor with a proper reading of the German law as laid out by the German Constitutional Court.

Amongst the many other outstanding essays in the *Festschrift*, special mention should finally be made of Bruno Simma's "*Staatenverantwortlichkeit und Menschenrechte im ILC-Entwurf 2001*". Simma, who had been a member of the ILC before being elected to the ICJ in 2002, takes us through the different revisions of the ILC's Draft Articles on State Responsibility as they relate to *erga omnes* obligations and the protection of human rights. This is a very timely subject, as it demonstrates that international law today does not accept the proposition of unlimited sovereignty. At the same time, Simma's essay serves as a reminder of the difficulties encountered in the "progressive development of international law" (cf. Article 13 of the UN Charter).

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Marrack Goulding (ed.): Peacemonger

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For about seven years (1986 to 1993), Marrack Goulding was in charge of peacekeeping operations in the United Nations Secretariat. As a direct predecessor to “the legendary” (p. 3) Brian Urquhart he held a prominent post during the tenure of both Pérez de Cuéllar and Boutros Boutros-Ghali. Kofi Annan was his successor before taking over the Secretary-Generalship. Goulding’s time in office marks the transformation of world politics induced by (and leading to) the end of the Cold War. This transformation also had direct consequences for the practice of peacekeeping. In 1986 Goulding had to take care of five operations with roughly 10.000 personnel in the field. By 1993 the numbers had changed dramatically: now thirteen operations with 55.000 personnel were in place; the expenditure for peacekeeping operations had risen from US\$ 240 million to US\$ 2.7 billion. In 1988 the UN peacekeepers had received the Nobel Peace Prize but the limitations and shortcomings of this tool of world organization were becoming increasingly obvious.

The book is subdivided into eighteen chapters arranged under five broad headings. Goulding portrays the peculiarities and specific constellations of about a dozen conflicts scattered all over the globe. “Relics from the Past” for example deals – among others – with Cyprus and Lebanon whereas “New Opportunities” focuses on Namibia or Cambodia. In “New Threats” the challenge of collapsing states (Somalia and Haiti) as well as the conflict in Yugoslavia is analyzed. Goulding masters his material with a remarkable ability to outline the characteristic features of a given conflict in a concise and readable way. Witness for example his account of the situation in Lebanon: “Think of Lebanon as a cockpit. But it is not a normal cockpit. The fights are not single combats between two cocks; they are fights between teams of cocks, in ever-changing alliances (...). Inside the cockpit there are several resident teams of cocks. The four principal ones are the Maronite Christians, the Sunni Muslims, the Shi’ite Muslims and the Druze, a heretical Islamic sect. There are other lesser teams of cocks. Each team includes some fighting cocks, called ‘militias’ (...). Sometimes teams fight within themselves and split into two or more smaller teams (...). Around the cockpit there are several gamblers. The principal ones are Israel, Syria, Iran and the Palestine Liberation Organization (PLO). Lesser ones are Egypt, Iraq and Jordan. Like the resident teams, the gamblers’ objective is to accumulate and control assets in the Lebanese cockpit. Three of

them (Israel, Syria and the PLO) have, or have had, their own fighting cocks in the cockpit. But all of them also hire the services of one or more of the resident teams, as do Iran and the lesser gamblers". (p. 58) In his analysis, Goulding draws from entries in his diary, letters to his family as well as accounts of meetings and negotiations. His itinerary amidst the different missions consists of a multitude of visits and travels, intense shuttle diplomacy, drafting sessions for reports, dealings with troop-contributing countries and the day-to-day procedure of international bureaucracy.

Goulding claims to write "with a frankness that is not customary in the United Nations" (p. 341). He apologizes in advance for possibly hurting former colleagues and persons involved in the various missions: "But as the writing proceeded it became clear that the drawing of conclusions and the definition of precepts that would enhance the United Nations' efficacy would be impeded if I did not write frankly about the performance of individuals, myself included". (p. x) The inclusion of the author among the objects of scrutiny and criticism is no hollow promise. There are various examples when Goulding unreservedly blames himself for his own misjudgements, failures and shortcomings. A constant feature of his description of work in the Secretariat is for example the rivalry between the departments and Under-Secretaries-General on the one side and the Secretary-General and his core staff and personal advisers on the other side. These tensions are exemplified in Goulding's relationship with Giandomenico Picco, who worked as de Cuéllar's Assistant for Special Assignments and at various times (for example in the hostage negotiations in Lebanon) crossed lines with Goulding, who even speaks of the so-called "palace guard" (p. 238) that at times undermined his own efforts. The exclusion or inclusion in delegations, travels etc. from this point of view is a measure for administrative standing and Goulding does not avoid speaking of "personal setback[s]" (p. 121) when for example negotiations are being driven from his field of competence. The "absence of clearly defined divisions of labour between the Under-Secretaries-General and the Secretary-General's personal staff and between the Under-Secretaries-General themselves" (p. 208) thus led to "turf warfare" (p. 210). It is, however, impressive to see that Goulding sticks to his aim of an unbiased view on the United Nations when he still shows respect for qualities of even his adversaries. This accounts for a good deal of the authenticity that his report can claim.

Negative coordination and, the lack of coherent guidance due to the dispersal of responsibilities between departments made the management

of peacekeeping even more daunting and underline a common feature of international bureaucracy: "All multinational bureaucracies are rent by jealousy, intrigue and the clash of personalities. This is not surprising: the officials concerned come from varied backgrounds; most of them are loyal to the institution they serve but they also have loyalties to their own countries; and they often have differing perceptions of the people and situations with which they deal" (p. 174). This judgement however does not distract from Goulding's insistence on the unmatched quantity of courage, idealism and enthusiasm he found among United Nations staff. He himself stresses the fact that insistence on his independence from his "home country" made him "something of a misfit on the 38th floor" (p. 6) since the Secretary-General at times may want to utilize his Under-Secretary-General's ties with and channels to his respective home country and administration. The requirement of international loyalty thus becomes a constant tightrope walk.

The need to keep a delicate balance also permeates other features of the work at the United Nations. Goulding gives various examples of "UN speak" (p. 32), diplomatic language that tries to reconcile the irreconcilable. Nearly all negotiations offered "terminological pitfalls" (p. 49, fn. 49) that could endanger substantial progress on the diplomatic front. But even within the Secretariat, language had to be guarded in face of power structures: "Boutros-Ghali shared Pérez de Cuéllar's view about the Secretary-General's right to decide what he will recommend to the Member States. But, like Pérez de Cuéllar, he respected power and usually preferred to give in privately to the Five rather than be shot down in flames by them in the Security Council" (p. 180). But such mechanisms in the end led to problematic wording of United Nations resolutions: "I often used to feel that more heed would be given to the Security Council's resolutions and statements if they were fewer, shorter and less distant from reality (...)" (p. 188). A little bit later Goulding postulates: "The length of resolutions is a reliable indicator of UN impotence" (p. 197). This is not the least problem peacekeeping operations have to face.

Goulding conceptualizes different types of peacekeeping: traditional peacekeeping operations (e.g. UNIKOM in Iraq/Kuwait), preventive peacekeeping (e.g. UNPROFOR in Macedonia), multifunctional peacekeeping (e.g. UNTAC in Cambodia) and complex emergency peacekeeping (e.g. UNPROFOR in Bosnia) (pp. 15-16). In general, Goulding favours a reluctant understanding of the purpose and aim of peacekeeping: "The peacekeepers' task is not to use force to end a war or impose the will of the international community" (p. ix). Peacekeep-

ers have to observe the requirements of neutrality and impartiality; two terms on whose difference Goulding writes: "The answer I usually gave was that 'impartiality' was about judgement and 'neutrality' about action. Impartiality means applying common standards in judging the behaviour of two hostile parties and not condoning acts by one that are condemned if committed by the other. Neutrality means not taking action that would serve one side's interest and damage the other's" (p. 222). This may cause considerable confusion in the field: "Peacekeeping can require military commanders to accept operational arrangements which make little sense from the military point of view" (p. 160). A more general observation in this context is the ever-present "sensitivity about sovereignty" (p. 22) that emerges as a core problem of Goulding's time in office. He witnesses a considerable change of the "international ethos" (p. 24) with regard to the definition of purely internal affairs of a state and the requirement of consent for peacekeeping operations that is linked to the scope and legitimacy of sovereignty attributed to various actors in a given conflict. It is in this and other dimensions that peacekeeping emerges as an "ethical enterprise" (p. xi).

Against the background of his experience, Goulding sums up: "Pious and naive though it may sound, I believe that the shortcomings which have been described in this book will be corrected only if the United Nations can find a way back to the ethical role defined in its Charter" (p. 343). This way back needs action from both the Secretariat and Member States. Regarding the Secretariat, Goulding draws the conclusion: "[W]e in the Secretariat adjusted too slowly to the demands of the new types of conflict which proliferated after the end of the Cold War" (p. 17). Due to the lack of resources and the rise in quantity and complexity of operations "an undeniable decline in the quality of our performance" (p. 138) could be observed. With a view to his personal responsibility, Goulding deplores the fact that unresolved administrative issues that probably could have been settled in the eighties were aggravated and exposed by the turmoil and stretch of capabilities at the beginning of the nineties. Regarding the obligations of Member States he points to the need for continuous support regarding resources, information and political support that alone can keep peacekeeping on track. The resoluteness to confront even the smallest denials and neglect of obligations by the conflicting parties must be met by the constant search for face-saving options for all concerned.

Goulding clearly utters warnings against the "illusions of grandeur" (p. 344) that for a short time were attached to the possibilities of peacekeeping. But he nonetheless identifies the vital role peacekeeping

can play in the search for peaceful resolutions of conflicts and the range of successes that could be achieved. The theory and practice of peacekeeping need constant adaption: "Peacekeeping was (and still is, to a lesser extent) an unwritten art practised by an organization whose collective memory is not strong" (p. 125). With his account of seven crucial years in the history of the United Nations Goulding adds to the collective memory of the organization. In that sense one may also take his description of Urquhart as a valid description of Goulding's own achievement: "Urquhart's courage, intelligence and political street-wisdom had made him a model international civil servant, committed to the multilateral ideal, but realistic, and often very funny, about the shortcomings of the institutions and individuals charged with putting it into practice" (p. 3).

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