

# BOOK REVIEWS

BETRAYAL FROM WITHIN. BY JAMES BARROS. New Haven: Yale University Press, 1969. Pp. 285. \$10.00.

THE UN SECRETARY-GENERAL AND THE MAINTENANCE OF PEACE. BY LEON GORDENKER. New York: Columbia University Press, 1967. Pp. xx, 380. \$10.00.

THE FIRST FIFTY YEARS: THE SECRETARY-GENERAL IN WORLD POLITICS, 1920-1970. BY ARTHUR W. ROVINE. Leyden: A. W. Sijthoff, 1970. Pp. 498. f. 62 (\$20.23).

*Richard N. Swift*†

The early years of a new Secretary-General's term<sup>1</sup> is a good time to think about the man and the office and to look at these three excellent contributions to the growing library of books dealing with the Secretary-General.<sup>2</sup> The office is a fascinating one, largely because it is, as all these authors realize, so much a creation of the person who fills it. Neither the League of Nations Covenant nor the United Nations Charter tells us much about the post. "The [League] Secretariat shall comprise a Secretary-General and such secretaries and staff as may be required," the Covenant states, adding rather mysteriously that "[t]he Secretary-General shall act in that capacity at all meetings of the Assembly and of the Council."<sup>3</sup> *That capacity!* What capacity? Despite the sanction for the title *Secrétaire-Général* in French diplomatic practice, few could have answered at the time. The job was seen as exclusively administrative, however, and, except for a brief flirtation with the notion of creating a "chancellor of the League,"<sup>4</sup> no one intended "that the Secretary-General should be an aggressive character, a statesman or leader."<sup>5</sup>

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<sup>1</sup> On the recommendation of the Security Council, the General Assembly on December 22, 1971, appointed Kurt Waldheim as its fourth Secretary-General for a five-year term, which began on January 1, 1972.

<sup>2</sup> J. BARROS, *BETRAYAL FROM WITHIN* (1969) [hereinafter cited as BARROS] and A. ROVINE, *THE FIRST FIFTY YEARS: THE SECRETARY-GENERAL IN WORLD POLITICS, 1920-1970* (1970) [hereinafter cited as ROVINE] have excellent bibliographies. The notes in L. GORDENKER, *THE UN SECRETARY-GENERAL AND THE MAINTENANCE OF PEACE* (1967) [hereinafter cited as GORDENKER] contain useful bibliographical references. Special reference should perhaps be made here to the continuing value of S. SCHWEBEL, *THE SECRETARY-GENERAL OF THE UNITED NATIONS* (1952). B. URQUHART, *HAMMARSKJÖLD* (1973) appeared too late to be reviewed here.

<sup>3</sup> LEAGUE OF NATIONS COVENANT art. 6, paras. 1, 4.

<sup>4</sup> GORDENKER, *supra* note 2, at 5.

<sup>5</sup> C. EAGLETON, *INTERNATIONAL GOVERNMENT* 263-64 (3d ed. 1957).

Although the U.N. Charter is a "modernized model" of the Covenant, to use Gordenker's phrase,<sup>6</sup> and although, as he points out, the Preparatory Commission of the U.N. Conference on International Organization devoted a great deal of attention to the Secretariat,<sup>7</sup> the Charter tells us little more than the Covenant about the office. "The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General . . . shall be the chief administrative officer of the Organization."<sup>8</sup> The Charter, like the Covenant, speaks of the Secretary-General acting "in that capacity,"<sup>9</sup> but it goes beyond the Covenant in authorizing the Secretary-General to "perform such other functions as are entrusted to him" by other U.N. organs.<sup>10</sup> Even more important, it permits him (under Article 99) to "bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." The origin of this "special right," as the Preparatory Commission called it,<sup>11</sup> lay in the "widespread criticism of the League system, which had allowed only a member state to bring an alleged threat before the Council and thus had hampered its speedy convening to deal with a threat to peace."<sup>12</sup> But it is a limited grant of power, as Gordenker makes clear,<sup>13</sup> for even if the Secretary-General uses it, he

commits the members of the [Security] Council to nothing. They may or may not agree even with his assessment of a matter as bearing on the maintenance of peace. He may send documents to the Council, speak before it, intervene in its discussions, and hold confidential consultations. But he can neither vote in favor of, nor veto, a resolution before it.<sup>14</sup>

The reluctance of Secretaries-General to use the power unless assured of a positive response—note how neither U Thant nor Kurt Waldheim invoked it in regard to Vietnam—shows that incumbents have been aware of the realistic political limitations of their position. On the other hand, Gordenker's discussion of the single explicit use of Article 99 by Dag Hammarskjöld, in calling the crisis in the Congo to the attention of the Security Council,<sup>15</sup> and of its two implicit

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<sup>6</sup> Cf. GORDENKER, *supra* note 2, at 16-33.

<sup>7</sup> See *id.* 27-33.

<sup>8</sup> U.N. CHARTER art. 97.

<sup>9</sup> *Id.* art. 98.

<sup>10</sup> *Id.*

<sup>11</sup> U.N. Preparatory Comm'n, Report, U.N. Doc. PC/20, at 87 (1945); cf. GORDENKER, *supra* note 2, at 137-58.

<sup>12</sup> R. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER 432 (1958); accord, L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS 573 (3d & rev. ed. 1969).

<sup>13</sup> GORDENKER, *supra* note 2, at 137-58.

<sup>14</sup> *Id.* 331.

<sup>15</sup> *Id.* 139-43. Trygve Lie claimed that he had used Article 99 in the Korean case,

uses<sup>16</sup> effectively demonstrates that the mere existence of the "special right" heightens the impact of the Secretary-General's intervention.<sup>17</sup>

The wider powers of the U.N. Secretary-General owe much to the positive example set by the first head of the League of Nations, Sir Eric Drummond, who was careful to emphasize the administrative nature of his position. Nonetheless, as Rovine and Gordenker clearly demonstrate,<sup>18</sup> Sir Eric was able during his term of office (1920-1933), to play an important part in world diplomacy. His political acumen, his close attention to international developments, his integrity, the confidence that national statesmen had in him, and his place at the center of much diplomatic traffic—all combined to permit him to exercise a quiet, but decisive influence on international affairs.

Of course, even administration has its political hazards,<sup>19</sup> and no formal grant of powers can make up for a Secretary-General's stupidity or knavishness. Barros' sad, but obvious duty has been to demonstrate that proposition. He gives us an astonishing and gripping account of Joseph Avenol, second Secretary-General of the League, whose limited perceptions, sympathy with the fascist and Nazi "new order," and aversion to "Bolshevism" led from 1933 to 1940 to the "betrayal from within." No longer can it be said, as Gordenker did in 1967, that "the final chapter of Avenol's incumbency remains somewhat murky,"<sup>20</sup> for Barros has directed a spotlight upon it. He has steeped himself in all the available documents in the League Archives at Geneva and in the several foreign offices; he has familiarized himself with the memoirs of the time; and he has interviewed everyone he could find who participated in the critical events of the late thirties. The result is a scholarly, impassioned account of Avenol's grievous failures to understand what really was at stake as he helped preside over the successive sacrificial offerings of Ethiopia, Danzig, the Rhineland, and Czechoslovakia on the altar of appeasement. We have here a masterful portrait of an international villain, rushing off to Italy in futile efforts to save the League of Nations by throwing Ethiopia to the contemporary Roman legions, and ultimately prepared to dismantle the entire League apparatus if, by doing so, he could ingratiate himself with Pétain in Vichy France and Hitler in Berlin.

Most of the large events that loom in the background of Barros' canvas will be familiar to his readers—in fact, he assumes some familiarity with the times—but it is a great tribute to him that, especially as he writes on "Defeat in the West" and on "Avenol's

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but that claim is not in fact borne out by the U.N. official records. Compare 5 U.N. SCOR, 473d meeting 1-3 (1950), with T. LIE, IN THE CAUSE OF PEACE 328 (1954).

<sup>16</sup> GORDENKER, *supra* note 2, at 143-47.

<sup>17</sup> *Id.* 146.

<sup>18</sup> See *id.* 6-10; ROVINE, *supra* note 2, at 17-103.

<sup>19</sup> See GORDENKER, *supra* note 2, at 90-119.

<sup>20</sup> *Id.* 11.

Resignation," we feel caught up in "Götterdämmerung." The book at this point, as they say about all great thrillers, is hard to put down, perhaps because it comes through so clearly as a clash between "good" and "evil." On the one hand, as requested by Vichy France, Avenol is abandoning his post, but trying to retain some authority over the League; on the other hand, heroic men like the "diminutive and shy"<sup>21</sup> Sean Lester and his colleague, Thanassis Aghnides, were determined, if at all possible, to save the vestige of an independent League for the post-war world.

To Lester, who eventually succeeded Avenol, and whose hitherto unpublished diary Barros puts to such effective use, Avenol appeared in 1940 to be

plotting for the enemies of his country before an offer to lay down arms was accepted; he had plans to please them before the blood of his massacred countrymen was cold; he spoke with complacency of a new state when the glory of the old was being mangled under the tanks of the invaders; he conspired to betray the trust placed on him and to corrupt the honour of his associates in a debased self-interest. A pompous self-opinionated creature when relieved of fears for his person and his belongings.<sup>22</sup>

Lester's own tribute to Aghnides, which Barros quotes from a copy of a letter in the League Archives, is a quiet, moving, and compelling encomium to both men:

I cannot omit mentioning the special service you rendered to the League at the most dangerous crisis which has faced the Secretariat since its beginning. I say 'service to the League' but the English poet expressed it better—that one who to his own self be true cannot then be false to any man. . . . One man does not say to another man: you have conducted yourself as a man of honour—that is the privilege of Kings. But there is always some bond between two comrades who stood quietly side by side at a time when the horizon and the future were dark and uncertain and when there was only one guide to conduct, the simple one of duty.<sup>23</sup>

These indeed are heady materials, and this portion of Barros' book will long endure for its vivid account of the impact of personality upon international organization.<sup>24</sup>

What Barros has to say of Avenol is generally confirmed by Rovine, who presents us with a single chapter on each of the League

<sup>21</sup> ROVINE, *supra* note 2, at 173.

<sup>22</sup> Lester Diary 478, in BARROS, *supra* note 2, at 233.

<sup>23</sup> Letter from Sean Lester to Thanassis Aghnides, Apr. 22, 1944, in BARROS, *supra* note 2, at 244-45.

<sup>24</sup> For another, see E. PHELAN, YES AND ALBERT THOMAS (1949).

and U.N. Secretaries-General. Rovine draws on published materials and, in the case of the League, on League Archives, on the papers of Raymond B. Fosdick (who planned originally to collaborate on this work), and on various national records, particularly on the National Archives of the United States. Rovine presents his historical material clearly and economically in well-written, comprehensive, and interesting chapters exemplifying Carlyle's dictum that history is the essence of innumerable biographies.<sup>25</sup> His theoretical chapter on the "Secretary-General in World Politics" is, however, somewhat self-conscious and arid—less Rovine's fault, perhaps, than the failure of political science to give us any really illuminating theories, even at the "middle level of abstraction" Rovine aims for.<sup>26</sup>

In this final chapter, in any case, Rovine tells us that "the most critical asset at the disposal of the Secretary-General is his *neutrality*,"<sup>27</sup> although he quickly points out that *neutrality* is not the right word to use in the sense of "a simple posture between two antagonists,"<sup>28</sup> because adhering to the Charter does not always permit neutrality in this sense. When a state challenges the principles of the Charter, the Secretary-General must defend them—even at the cost of his acceptability to the great powers who are his most influential, if not his most important, clients.<sup>29</sup> *Impartiality* in applying the Charter's principles is probably far more important, as Rovine recognizes elsewhere.<sup>30</sup> Rovine also pays due deference to the value to the international community of the Secretary-General's diplomatic skills and access to political information. And he discusses the importance both of the Secretary-General's role as international rule-maker and also of his symbolic position as head of a general international organization who can confer legitimacy upon international postures.<sup>31</sup>

Although Rovine looks at a wider range of international experience than does Gordenker and has the advantage of several years'

<sup>25</sup> 9 T. CARLYLE, *Biography* in COLLECTED WORKS 3, 6 (1839-69).

<sup>26</sup> ROVINE, *supra* note 2, at 415.

<sup>27</sup> *Id.* 416.

<sup>28</sup> *Id.*

<sup>29</sup> The issue was joined by Hammarskjöld in a statement to the General Assembly on October 3, 1960, when he stated:

It is not the Soviet Union or, indeed, any other big Powers who need the United Nations for their protection; it is all the others. In this sense the Organization is first of all their Organization, and I deeply believe in the wisdom with which they will be able to use it and guide it. I shall remain in my post during the term of my office as a servant of the Organization in the interests of all those other nations, as long as they wish me to do so.

D. HAMMARSKJÖLD, *SERVANT OF PEACE* 319 (1962). On the other hand, all five permanent members of the Security Council must agree when they nominate a candidate for Secretary-General for the General Assembly to approve. See U.N. CHARTER art. 27. See also GORDENKER, *supra* note 2, at 34-63.

<sup>30</sup> ROVINE, *supra* note 2, at 417-18.

<sup>31</sup> See R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963); Claude, *Collective Legitimization as a Political Function of the United Nations*, 20 INT'L ORG. 367 (1966).

additional perspective, Gordenker's final assessment is just as informative and far more readable. He draws on the concept of *influence*, as Richard Neustadt did in his *Presidential Power*,<sup>32</sup> and he writes with enviable clarity and grace. It is hard to improve on his proposition that "the Secretary-General can act within narrow but undefined and shifting limits, and [that] his independent actions influence the course of international politics but never at a constant level."<sup>33</sup> He points out that Kurt Waldheim's predecessors have all believed that the U.N. has a significant role to play in world politics; have been convinced that the Secretary-General has an important place in developing policies to help maintain international peace and security; and have insisted that the office should be politically independent and international in outlook.<sup>34</sup> Gordenker's final chapter about the Secretary-Generalship is, in fact, a fitting companion piece to Dag Hammarskjöld's own lectures on *The International Civil Service in Law and in Fact*.<sup>35</sup> Gordenker sums up the political and institutional assets and liabilities of the Secretary-General, including the "personal intelligence, ingenuity, tact, courage, and stamina" required to succeed in the "besieged and lonely" office.<sup>36</sup>

On the importance of great personal qualities in a Secretary-General, all our authors agree. Where they part company and where they raise the most controversial questions is in the way they define the proper constitutional role of the Secretary-General. Barros looks back at the tragic story he has told us of Avenol and concludes, in his brief final chapter on "Implications for the Office of Secretary-General," that Avenol's melancholy story proves that "[t]he belief in a politically active Secretary-General . . . appears to rest on a form of escapism. It is fundamentally an attempt to circumvent the fact that . . . the office of Secretary-General can be a disruptive and disquieting influence in the international community."<sup>37</sup> He adds that:

As long as the world community is founded on the nation-state system . . . the office of Secretary-General, though it can, in the right hands, sometimes play an important role in maintaining the peace, can also, in the wrong hands, play a dangerous role in exacerbating the tensions of the world community. . . .

Since the office is by its very nature political, the Secretary-General should be restrained or controlled in his actions as much as possible.<sup>38</sup>

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<sup>32</sup> R. NEUSTADT, *PRESIDENTIAL POWER* (1960).

<sup>33</sup> GORDENKER, *supra* note 2, at xiii.

<sup>34</sup> *Id.* 84-85.

<sup>35</sup> Published in 1961.

<sup>36</sup> GORDENKER, *supra* note 2, at 328, 335.

<sup>37</sup> BARROS, *supra* note 2, at 264.

<sup>38</sup> *Id.* 264-65.

"[I]nternational politics," he quips at the end, "is too serious a matter to be left to the Secretaries-General."<sup>39</sup>

What Barros says here is true, of course, but only partly true. The whole truth is that international politics is too serious a matter to be left to national leaders as well. Certainly the challenges of the 1930's were far too much for Neville Chamberlain and Edouard Daladier. Their contributions to the debacle of 1939, to say nothing of those of Hitler and Mussolini, were far greater than Avenol's. Barros warns us that a poor Secretary-General, another Avenol, could in times of crisis be an international disaster. His point is well taken, and one can sympathize with his pessimism after recreating the tragedy of the years before World War II. But even he has earlier wondered:

what would have happened if Avenol had shown the same imagination, initiative, and skill in prodding the British and French to maintain the status quo in Europe as he did in expelling the Soviet Union from the League or in undermining the legal and moral position of the Ethiopian government. Is it conceivable [he asks] that Germany would have been less free to destroy European and world peace?<sup>40</sup>

His implied answer is yes, and that is also the answer provided in the larger record presented by Rovine and by Gordenker. They show us that, except for Avenol, the Secretaries-General have been constructive forces in world politics even when, in some cases, they may have acted somewhat *ultra vires*. One need only recall that Sir Eric established the principle of an international civil service; that Sean Lester kept the League idea alive; that Trygve Lie gave a vigorous start to the UN and showed its potential for collective security in Korea; that Dag Hammarskjöld developed the constitutional theory of the Secretary-General, practiced "preventive diplomacy," and increased the capacity of the U.N. for peace-keeping; and that U Thant conserved Hammarskjöld's gains under far greater constraints, significantly helped resolve the West Irian dispute, offered face-saving formulae to dissipate the Cuban missile crisis, helped to get peace talks started in Vietnam, pressed for admitting the People's Republic of China to the U.N., and promoted international concern for the environment. Even Avenol must receive credit for setting in motion the plans that eventuated in states demonstrating the much larger concern for an organized approach to international economic and social problems that has characterized the world since 1945.<sup>41</sup>

<sup>39</sup> *Id.* 265.

<sup>40</sup> *Id.* 260. Barros himself points out here that Avenol was not alone in failing to see that "the danger to the status quo presented by a German-Italian axis could only be counterbalanced by a British-French-Russian coalition supported by the smaller states of Europe," for fear of the Left was also the dominant passion of British and French leadership.

<sup>41</sup> Avenol asked the League of Nations Council to establish a committee to study the

Politics may well deny us the "perfect" Secretary-General. Gordenker's chapter on "The Appointment Process" shows us why and how "each appointment of a Secretary-General provides an occasion to define that office."<sup>42</sup> States, no doubt, get the Secretary-General they deserve. No doubt, too, Secretaries-General other than Avenol have made mistakes: Trygve Lie in identifying too closely with the United States, Dag Hammarskjöld in failing to protect himself adequately from charges that he was moving beyond his mandate, U Thant for withdrawing the U.N. Emergency Force so precipitately from Gaza in 1967.<sup>43</sup> But which national statesmen have not made mistakes? And would we, on balance, be better off without the Secretaries-General or their annual reports? As Gordenker points out, the reports on the work of the organization are instruments of public relations;<sup>44</sup> they are far more likely to take an impartial view of international problems and to serve the cause of international peace and security than national reports dealing with the same subjects.<sup>45</sup> Moreover, they have still unrealized potential as reports on the state of the world.

Gordenker, as he looks to the future, reminds us that "[e]ven though the Secretary-General influences the decision-making organs in various ways, he does not in the final analysis make decisions for governments,"<sup>46</sup> and cautiously concludes that "whatever the future of the United Nations brings, the office of Secretary-General can be expected to influence the work of the organization."<sup>47</sup> Rovine is more sanguine and professes to see a trend toward expanding the capabilities of the office of Secretary-General and a consequent trend toward "the slow development of a cooperative system of world order."<sup>48</sup> He offers us some suggestions by drawing on recent proposals for giving the Secretary-General greater military and strategic expertise.<sup>49</sup> Certainly, it is in matters of peace-keeping and peace-making that

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League's organizational problems pertaining to the "technical realm." The Committee, established May 27, 1939, was chaired by Stanley Bruce (Australia), and the "Bruce Committee" report was a harbinger of the specialized agencies and of the Economic and Social Council of the United Nations. BARROS, *supra* note 2, at 194-95.

<sup>42</sup> GORDENKER, *supra* note 2, at 62.

<sup>43</sup> Writing before U Thant withdrew the UNEF, Gordenker says, with foresight, "In general, the Secretary-General will have a great influence on deciding when a peace-keeping mission is to be ended if there is general agreement that much of his mandate has been fulfilled. If there is no such agreement, it is unlikely that he would suggest dissolving a peace-keeping force since to do so would tend to aggravate existing conflicts." *Id.* 284. See also *id.* 254.

<sup>44</sup> *Id.* 123.

<sup>45</sup> Cf. U.S. DEP'T OF STATE, FOREIGN POLICY OF THE UNITED STATES 1970; U.S. DEP'T OF STATE, FOREIGN POLICY OF THE UNITED STATES 1971.

<sup>46</sup> GORDENKER, *supra* note 2, at 330.

<sup>47</sup> *Id.* 336.

<sup>48</sup> ROVINE, *supra* note 2, at 463.

<sup>49</sup> See O. YOUNG, THE INTERMEDIARIES: THIRD PARTIES IN INTERNATIONAL CRISES (1967). See also L. FABIAN, SOLDIERS WITHOUT ENEMIES (1971).



the Secretary-General has proved most vulnerable. The member states too often leave the Secretary-General in an exposed position because they themselves are unable to unite on an approach to a problem. Even so, Mr. Hammarskjöld and U Thant did not hesitate to criticize national policies when they seemed to run counter to states' treaty obligations under the Charter, and Dr. Waldheim has begun to do the same. The Secretaries-General cannot act as the world's scourge without limit, however, and all these authors help to tell us why.

Perhaps, though, in the not too distant future, states will acknowledge the value of the Secretary-General's Office and make it a more effective agent of international peace and security—not only for the sake of the United Nations, but also in their own national interests. An impartial Secretary-General "above the battle" is too important to the modern world to deny him the institutional props he needs. Hammarskjöld's use of an *ad hoc* Advisory Committee for the Congo<sup>50</sup> was a personal answer to the problem of getting political advice, but it did not include all the parties concerned and proved inadequate to the situation. The U.N. still needs to explore the value of standing advisory committees for the Secretary-General. The members could be members of permanent U.N. missions, respected individuals elected by the Assembly to special advisory boards, or members of advisory commissions, whom the Secretary-General could nominate and the Assembly confirm.

All these devices could offer the Secretary-General the advantage of wider perspectives than he can now command.<sup>51</sup> International peace and security would be enhanced even more, however, if states could see their way clear to give the Secretary-General his own political arms—perhaps a U.N. diplomatic service which could provide him with as much information and diplomatic support as the diplomatic service of a small- or middle-sized power. A Secretary-General with fifteen representatives at large, serving in major capitals and in selected trouble spots around the world, with a policy planning council in the Office of the Under Secretary-General for Special Political Affairs to which these representatives could report and where their reports would provide an intelligence base for the Secretary-General, would go a long way to strengthen the United Nations as an instrument of diplomacy. The cost would not be large—in fact, as a kind of insurance policy against some of the risks of war, it would amount to no more than a prudent investment.

Too much today is left to the accident that successive Secretaries-General may be skilled diplomatists. Not all of them, however, will

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<sup>50</sup> The Secretary-General invited the permanent representatives of the states with forces in the Congo to serve on the Committee: Canada, Ceylon, Ethiopia, Federation of Malaya, Ghana, Guinea, India, Indonesia, Ireland, Liberia, Mali, Morocco, Nigeria, Pakistan, Senegal, Sudan, Sweden, Tunisia, and the United Arab Republic. YEARBOOK OF THE UNITED NATIONS 713 (1961). See also GORDENKER, *supra* note 2, at 291-96.

<sup>51</sup> See also Swift, *The Secretariat*, in NEW DIMENSIONS FOR THE UNITED NATIONS: THE PROBLEMS OF THE NEXT DECADE 189 (1966).

have the talents of Sir Eric or of Dag Hammarskjöld, and the office needs institutional arms to sustain and enhance it. Such institutional changes would recognize the actual and potential value of the United Nations as a "third party" in international disputes and would do much to guarantee that the dialogue between the United Nations and world policy-makers was as fruitful as possible.

Even without these admittedly optimistic developments, the Secretary-General remains a useful and independent judge of the policies of nations. Given the tenacity of our present international system,<sup>52</sup> the inherent potentials in the office of Secretary-General may not develop, and we shall have to content ourselves with what we have. But the lesson to be learned from Gordenker's survey of the Secretary-General's role in maintaining international peace and security, from Barros' account of Joseph Avenol's "betrayal," and from Rovine's survey of "the first fifty years," is that if we come to a time when the voice of the Secretary-General is either not heard in the land or heard only in harmony with the great powers, the next fifty years will be but hollow echoes of the last.

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<sup>52</sup> See J. HERZ, *INTERNATIONAL POLITICS IN THE ATOMIC AGE* (1959); Herz, *The Territorial State Revisited*, 1 *POLITY* 12 (1968).

HARMONIZATION OF EUROPEAN COMPANY LAWS: NATIONAL REFORM AND TRANSNATIONAL COORDINATION. BY ERIC STEIN. Indianapolis: Bobbs-Merrill Co., 1971. Pp. lxii, 558. \$22.50.

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After the Second World War, it became evident to Europeans that in order to prosper economically in the face of the two emergent outside superpowers, it was imperative that Western Europe integrate. The European Economic Community (EEC), which came into being by treaty<sup>1</sup> in 1958, was conceived as the main instrument for the realization of this aspiration on a gradual basis, starting with a customs union, proceeding with economic unification and ending with some form of political integration. At the heart of the new European economic system was the elimination of state frontiers as barriers to the movement of people, products and resources. Since a large and increasing segment of economic activity is carried out by corporations, their mobility appeared of obvious importance for the creation of a single market.

Professor Stein's book outlines the problems and describes, in a highly readable account, both what has already been done and what remains to be accomplished in the process of integrating the European corporate scene. As a bonus and useful background, Stein also briefs us on recent progress in reforming and organizing the corporate law of the individual EEC member states. The merits of the book are many and weighty. Stein's multilingual ability, versatility in the comparative method, knowledge of the European systems, and understanding of the settings in which the issues are posed, uniquely qualify him to perform the formidable task of integrating, rather than cumulating, these extensive and disparate materials. Not only is the book a treasury of information, compactly and stylishly presented, on both national and European corporate law; but it also contains fascinating accounts of how the new European institutions work, the pressures they generate, and the counterpressures that develop from national sources. If there is one weakness in the book, it exists only from the point of view of a teacher of corporations whose appetite has been whetted: because of its wide scope, there is no room for detailed analysis of specific provisions or institutions of European corporate law and for comparison with their American counterparts.

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<sup>1</sup> Treaty Establishing the European Economic Community, 298 U.N.T.S. 11.

It goes without saying that corporations located in Europe have been the major beneficiaries of the liberalization of intra-community trade which culminated in 1969. Another phase of the integration process directly of concern to corporations has been the development of freedom of establishment; that is, the freedom of a corporation of one member state not merely to export into others, but also to directly set up production and distribution operations (through branches and agencies or by means of the formation or acquisition of subsidiaries) in other member states on non-discriminatory terms. Articles 52, 54 and 58 of the original Treaty make it clear that companies established in one member state and having their registered office, central administration or principal place of business within the Community, are to have such rights of establishment. The existing restrictions on corporate freedom of establishment were gradually eliminated under two general programs drawn up by the EEC Council in 1961, and the introduction of new restrictions is prohibited by article 53.

In the past, one of the principal formal obstacles to the mobility of European corporations has been the conflict of laws rule which subjects a corporation, as to its formation, continued existence, and internal affairs, to the law of the place of its "real seat," that is, the location of its central management. As a consequence, a corporation whose real seat was found to be in a state other than that of its incorporation would risk, for example, involuntary dissolution and liquidation. This rule appears inconsistent with a full right of establishment. Whether or not it was accordingly rendered *pro tanto* inapplicable by the Treaty, a new Convention on the Mutual Recognition of Companies and Legal Persons dealing with some aspects of this problem was signed in 1968 by the member states, pursuant to article 220. The Convention provides in essence that a corporation organized in one member state must be recognized in the others, at least if its real seat is somewhere within the Community or if it otherwise maintains a genuine link with the economy of a member state.

As noted by Stein, the impact of European integration upon corporate matters does not end with the freedom of establishment. In fact, the Treaty contains provisions regarding coordination and approximation of national company laws in certain contexts as well as the facilitation of inter-European mergers. To begin with, article 54(3)(g) mandates the coordination, with a view toward equivalence, of national protection for the rights of corporate shareholders and creditors. While the initial impulse for this Community action appears to have been a desire to provide minimum guarantees to member states in exchange for their agreeing to allow unlimited freedom of corporate establishment, the resultant coordination is bound to facilitate significantly the creation of Community-wide capital markets

and to affect the rights of security holders irrespective of establishment, as well. On the basis of article 54(3)(g), a First Directive was approved by the EEC Council in 1968 which dealt with corporate disclosures, the ultra vires doctrine, and nullities for failure to meet incorporation requirements. Stein devotes a significant portion of his book to a behind-the-scenes exploration of the long and controversial gestation process of this Directive, followed by a discussion of its provisions in considerable detail. During 1970-71, the Commission prepared and submitted to the Council for approval, three new directives under article 54(3)(g), dealing respectively with corporate capitalization (disclosure, maintenance and changes), internal mergers and consolidations, and the form and content of annual statements.

The question of mergers is a further complication, and Stein addresses it ably. In part as a response to the so-called "American Challenge," Europeans are willing to encourage corporate concentration for the purposes of taking advantage of economies of scale, improving management efficiency and technological development, and facilitating financing. National laws, however, do not provide for inter-European mergers, with the result that corporate acquisitions across frontier lines encounter almost insurmountable tax and technical barriers. Article 220 of the Treaty envisages a separate convention for inter-European mergers, however; and the preparatory work for such a convention, as well as that for a convention on the transfer of corporate seat without loss of legal personality, is already in progress.

Partly due to the difficulties encountered with inter-European mergers which could not be resolved through a harmonization convention, and partly because of the appeal of the concept itself, the EEC Commission put forward in 1970 a proposal advocating adoption of a Community statute for a new form of European company. Although much creative and comparative legal analysis went into the preparation of this federal-type statute, access to the new form is to be severely limited. By the terms of the statute only companies from different member states can be founders of a European company, and then only for purposes of merger or the formation of a holding company or a joint subsidiary; there is no possibility of transforming a national company as such into a European one.

However successful may be the campaign to remove legal roadblocks to corporate establishment across state borders and to make the laws governing corporations responsive to the needs of inter-European enterprise, little real progress will be made in practice as long as the tax systems of the member states are significantly different. Recognizing that income tax laws and practices directly affect the establishment and operation of the Common Market, and fixing their sights upon maximum tax neutrality, the EEC authorities commissioned a working party to study the direct taxation of company income in the member

states and to report on areas where equalization pursuant to article 100 of the Treaty might be desirable. The working party completed its task and prepared a detailed report. In the meantime, some other progress has been made, and a great deal is yet in store in this field. In 1965, the Council adopted a directive for the harmonization of issue and transfer taxes on securities also imposing maximum limitations. In 1969, the Commission laid before the Council<sup>2</sup> a memorandum dealing with measures for adjusting direct taxes on corporate dividends and interest, especially withholding taxes, for the purpose of avoiding double taxation. In the same year, the Commission submitted to the Council two draft directives for the establishment of a common tax system for mergers and for parents and subsidiaries, permitting, in particular, tax-free reorganizations and consolidation of income across state frontiers. In addition, the draft statute for the European company contains elaborate provisions on the taxation of corporate income.

From the point of view of the American corporation already operating or intending to establish operations in Europe, the effort to coordinate and harmonize the national corporate and tax legislation and to facilitate the growth of inter-European enterprises is a mixed blessing. To the extent that uniformity tends to establish minimum standards and regulations more stringent than those previously existing, without limiting the freedom of the states to impose additional regulation (as has often been the case), the changes may not be beneficial. Furthermore, European industrial concentration is likely to present a greater challenge to its American competitors. On the other hand, the stricter standards apply to the competition as well, and the consolidation and coordination of the European operations of American enterprises is also facilitated. What is of greater concern to the American corporation is the pressure from some quarters, especially France, for the exclusion from most of the benefits available to Community companies, of foreign-controlled corporations established in Europe, a pressure particularly directed against American subsidiaries. Stein recounts a number of instances where this attitude has surfaced; but it has not been able to progress very far, and it appears that in the end the corporate veil will not be pierced for this purpose. What is likely to emerge, however, in part as a concession to this effort, is a Community policy on foreign investment.

As a teacher of American corporate law with comparative law interests, I was particularly attracted by the glimpses provided by Stein's book into present-day European thinking on the major corporation law issues. It is rather disappointing that the recent reforms and movements for reform in Europe, with the partial exception of Germany, are traditionally oriented and aim mostly at the codification and classification of existing law rather than at implementation of sub-

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<sup>2</sup> As to the relative functions of the Commission and Council, *see id.* §§ 4, 7, 145-63.

stantive changes in light of modern corporate realities. For example, the conception of the corporation as a contract still haunts the formation of corporations with requirements of minimum numbers of shareholders and the resulting corporate nullities. Inordinate attention is still focused on the existence and maintenance of minimum formal capitalization for stock companies, as if it were the most significant indication of the worth of a going concern. (One must concede, however, that the Europeans have thus managed to avoid the special problems of initial undercapitalization which have led some American courts to overstretch the doctrine of piercing the corporate veil.) At the management level, the division of functions between a supervisory board and an executive directorate, which is becoming fashionable in Europe, is aimed not only at efficiency but also at the reinforcement of shareholder power at a time when, at least in the context of the large and mature corporation, this appears to be a lost cause.

One area where significant reform is taking place, however, both at the national and the European levels, is that of corporate reporting and disclosure, improving considerably the protection of security holders as investors. Probably the most intriguing feature of continental corporate law is illustrated by the German provisions which in effect pierce the corporate veil between parent, subsidiary and affiliated corporations and treat them as one entity in certain contexts in order to benefit shareholders (principally) and creditors (secondarily) of the controlled corporations. In America, comparable, though less comprehensive, results are often reached on equitable grounds, for example through the alter ego theory and the imposition of fiduciary obligations upon majority shareholders. Additionally, in considering the concept of co-determination developed in Germany for the participation of worker representatives in management policy-making, a concept which has been well received at the Community level despite the mixed German experience, one is reminded of the recent debates among corporate theoreticians in America on the need to make the corporation socially responsible and responsive to such constituencies as its employees, suppliers, distributors and, ultimately, customers.

In his admirable book, Professor Stein discusses, illuminates and updates most of the topics touched upon in this review, and anyone with an interest in European corporate developments who misses it will be depriving himself not only of a great wealth of information but also of the pleasure of reading a work well written.

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