

BOOK REVIEWS AND NOTES

EDITED BY DETLEV VAGTS

Right v. Might: International Law and the Use of Force. By Louis Henkin, Stanley Hoffmann, Jeane J. Kirkpatrick, Allan Gerson, William D. Rogers and David J. Scheffer. New York, London: Council on Foreign Relations Press, 1989. Pp. xii, 123. Index. \$12.95, paper.

The gods were furious on Mt. Olympus; the topic of debate, "right v. might," had obviously touched raw nerves. Zeus (played by Louis Henkin) hurled thunderbolts at everyone in sight. He charged that any transboundary use of force—with "virtually" no exceptions—was strictly forbidden under the Charter. Cowed into a corner, but gamely resisting, were Medusa (played by Jeane Kirkpatrick) and her sidekick Poseidon (Allan Gerson). The fleetest-of-tongue, Hermes (Stanley Hoffmann), tried to deflect the thunderbolts by inventing an endless stream of quasi-legalistic categories; as usual he spoke them faster than anyone could understand them, but as usual they were found illusory as soon as they were understood. Odysseus (William D. Rogers) slumped in resignation against an old weaver's loom; he had heard it all and seen it all many times, but as usual he declared the proceedings able and illuminating.

One of the loudest thunderbolts came when Zeus, slamming his fist on the nearest concept, declared that the sum total of international legal wisdom on the use of force could be found in one sacred text:

The UN Charter declared purposes and prescribed norms

Peace was more important than progress and more important than justice. The purposes of the United Nations could not in fact be achieved by war. War inflicted the greatest injustice, the most serious violations of human rights, and the most violence to self-determination and to economic and social development. War was inherently unjust. (pp. 38–39)

But Medusa and Poseidon rose to object that the Soviets have violated the Charter:

The Charter does not require that the United States stand idly by while the Soviet Union assists in the suppression of liberties in countries with strong indigenous movements struggling against oppression. (p. 34)

Glaring at them, Zeus thundered that they dare not violate the Charter just to imitate the Soviets:

Rejecting the Charter in effect would reject Nuremberg, undermine our national justification in history, and reestablish Adolf Hitler as no worse than anyone else. (p. 58)

Zeus knew whether in any specific instance the Charter had been "rejected," because he was the keeper of its true meaning:

Like every country, the United States occasionally is disposed to interpret the Charter in accordance with its own interests as it sees them. But an interpretation that does not accord with text, purpose, design, history, and other accepted principles of treaty construction will persuade nobody and will serve no purpose. (p. 59)

Zeus obliged the other gods by revealing the true meaning of the Charter as to any transboundary use of force. He proclaimed every such use, other than self-defense against an armed attack, to be illegal:

At bottom, all suggestions for exceptions to article 2(4) imply that, contrary to the assumptions of the Charter's framers, there are universally recognized values higher than peace and the autonomy of states. (p. 44)¹

These "suggestions for exceptions to article 2(4)" are not identified. Readers will recognize the "suggestions" as coming from younger scholars who may not be committed Chartists. Although the names of these mortals cannot be found in the book under

¹ To Odysseus's (William D. Rogers) credit, he notes ruefully that "article 2(4) is abstraction piled upon abstraction" (p. 101).

review,² their arguments are known to go something like this: The Charter attempted to create a monopoly of law enforcement power in the UN Security Council. The monopoly was a two-sided coin. One side was Article 2(4), prohibiting unilateral uses of force. The other side was the international army under the control of the Security Council. Thus, whenever a nation violated Charter norms or other important rules of international law, Article 2(4) prohibited non-UN enforcement and chapter VII of the Charter allowed the Security Council to send in its army to enforce the law.

To “apply” Article 2(4) in isolation from chapter VII would be to ignore the other side of the coin. That is not to say that Article 2(4) would be meaningless in the absence of Security Council enforcement action; rather, it must be carefully interpreted. Careful scrutiny reveals that it does not outlaw all transboundary uses of military force, but only those directed against a nation’s territorial integrity or political independence. A “humanitarian intervention” that does not annex any portion of the target state arguably is allowed by Article 2(4) if the Security Council’s enforcement capability is stultified by veto. Thus, since 1945 there have been several successful unilateral humanitarian interventions arguably creating new customary law, such as India in Bangladesh (1971), Tanzania in Uganda (1979), France in Central Africa (1979) and the United States in Grenada (1983) and Panama (1989).³

Henkin refuses to recognize this custom, because in his view it violates Article 2(4). He sees no reason to recognize forty-four years of practice that in his view is not justified:

² Except for Professor W. Michael Reisman, who is cited for a suggestion in a footnote by Henkin (p. 66 n.13). However, the pat on the back is short-lived. In the very next footnote, Henkin states that Professor Oscar Schachter “effectively demolished” Reisman’s suggestion (p. 66 n.14).

³ For detailed discussion, see F. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 155–200 (1988). The Panama intervention, of course, occurred after the book under review went to press. See D’Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 *AJIL* 516 (1990).

Clearly, it was the original intent of the Charter to forbid the use of force even to promote human rights or to install authentic democracy. Nothing has happened to justify deviations from that commitment. Human rights are indeed violated in every country. In some countries violations are egregious. But the use of force remains itself a most serious—the most serious—violation of human rights. (p. 61)

Therefore, the author of *The Rights of Man Today* and many articles on human rights in effect claims that if another Hitler should repeat the Holocaust against the Jews, so long as the genocide is confined to nationals within the neo-Hitler’s country, and so long as that country’s allies have a veto in the Security Council, any foreign nation’s forcible intervention to prevent the genocide would be illegal under international law as ordained by the Charter. Or if a radically repressive white minority regime were to take over in South Africa and begin a policy of extensive disappearances and murders of black leaders and spokespersons—a fear that fortunately appears to be receding—and if the Security Council were paralyzed, Henkin would have to hold this selective racial genocide to be one of those “egregious” violations of human rights that international law regrettably tolerates. For he values “the autonomy of states” (p. 44) above all considerations of morality and justice that affect real people—above every human value of care, compassion and empathy for neighbors suffering governmental oppression. He is more solicitous of the rights of states than of those of persons. So long as genocide, slavery or torture is “official” (government sponsored), the Nuremberg precedent is trumped by the Charter. What he offers us is an interpretation of the Charter that negates Nuremberg, the practice of states since 1945 and elementary considerations of transnational justice.

Pressed to give his own explanation of customary law since 1945, Henkin proclaims, in ringing terms nearly parodying an earlier, widely quoted pronouncement:⁴

⁴ “Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.” L. HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

Virtually every use of force in the years since the Charter was signed has been clearly condemned by virtually all states. Virtually every putative justification of a use of force has been rejected. (p. 40)

No god atop the mountain dared challenge this. No one asked *which* states "clearly condemned" these acts of force. No one asked *who* "rejected" all these putative justifications or *how* they "rejected" them. No one rejoined, for example, that "condemnations" expressed in General Assembly resolutions may often have been hypocritical.⁵ The use by Zeus of the passive voice side-stepped the need for citations or examples. Nor did any of the lesser gods question Zeus's own gloss of post-1945 practice, consisting of a series of startling concessions: (1) many instances of "humanitarian intervention" have "brought wide acquiescence" (p. 41); (2) "intervention to support self-determination" has been supported by "many states" (p. 42); and (3) a "permissive interpretation of article 51" that largely erodes Article 2(4) has "found favor with some commentators" (p. 45). Does the sum total of these admitted exceptions still support his original use of "virtually," or is Zeus entitled by virtue of his status to depart from the meaning of his own words without announcing that he is doing so?

A quite different account of the post-1945 limited use of transboundary force for humanitarian intervention can be found in a book by one of the many younger scholars that Henkin does not cite, Fernando Tesón.⁶ Indeed, Tesón's works are nowhere mentioned by any of the writers in the book under review—not even in the "suggested readings." Why indeed should the Council on Foreign Relations acknowledge the existence of scholarship not authored by one of its deities?

Nevertheless, *Right v. Might* does offer a revealing glimpse of thought processes on high. Consider one of its most hotly debated examples: the U.S. intervention in Grenada in 1983. In the hands of the gods, the criti-

⁵ For a general discussion of the potential hypocrisy of UN resolutions, and a specific application to the Israeli use of force against the Iraqi nuclear reactor of June 7, 1981, see A. D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 75-77 (1987).

⁶ F. TESÓN, *supra* note 3.

cal question becomes whether the intervention in Grenada is or is not an application of the Reagan Doctrine. Henkin announces that it *is* an application of the Reagan Doctrine and (therefore?) that it is illegal. The Kirkpatrick-Gerson contingent replies that it *is not* an application of the Reagan Doctrine, and (therefore?) that it is legal. However, the Reagan Doctrine itself, by Zeus, clearly violates the law of the Charter. No it does not, say Medusa/Poseidon—well, take that back: if it does technically violate the Charter it is only because it is a decent response to the Brezhnev Doctrine, which *really* violates the Charter. Although Zeus finds all instances of application of the Reagan Doctrine illegal (Grenada, Libya, Nicaragua (p. 54)), Medusa/Poseidon respond that each of these instances is a false application of the doctrine (p. 19), even though (apparently) their legality would be enhanced if they were applications of the doctrine. Medusa/Poseidon give an authoritative definition that sounds as if it came extemporaneously from former President Reagan himself:

The Reagan Doctrine permits assistance in self-defense. The Brezhnev Doctrine preserves foreign influence. The Reagan Doctrine restores self-government. It countenances counter-intervention, not intervention. The Reagan Doctrine is not a "roll-back," but it is a cousin to that idea. (p. 31)

Now that the debaters have been straightened out as to the precise meaning of the Reagan Doctrine, we return to the original question: Does it violate or vindicate the Charter? Do any of the discussed interventions upset or uphold the Reagan Doctrine? But by now, a funny thing has happened on the way to the forum. The very elucidation of the question has produced sheer indifference as to the answer.

One must be careful, in looking at a work produced by such a lofty Establishment institution as the Council on Foreign Relations, not to confuse the appearance of vigorous debate with the actuality of realistic debate. The sessions on Mt. Olympus were full of sound and fury; what they signified is another matter. Undoubtedly, the participants believed that they were illuminating real issues, that the loud clash of their viewpoints proved that it was an open debate,

that "both sides" were heard, that all one ever wanted to know about the use of force emerged, and that free speech and the marketplace of ideas were once again vindicated.

Well, it is not a marketplace in this book; it is an oligopoly. Although the topic is of critical importance and the debaters of considerable renown, the debate itself is abstract, Olympian, formalistic, compartmentalized, sanitized. No one was invited to the pantheon who might have challenged the underlying jurisprudential methodologies and assumptions of the debaters. External arguments were not cited if they would undermine the debate as the council preconceived it. Thus, the council produced a work of politics, not of scholarship. As such, its destiny is a place on the scrap heap of materials for future historians who wish to recount the legalistic illusions of late twentieth-century Establishmentarians. It is a story about the gods who, attempting to manipulate and monopolize the terms of an important debate, end up guaranteeing its irrelevance.

ANTHONY D'AMATO
Board of Editors

Cour permanente de justice internationale 1922-1945. Volume 5-I: La responsabilité internationale. Volume 5-II: La guerre et la neutralité. Edited by Peter Haggenmacher, Richard Perruchoud and Haritini Dipla. Published under the direction of Lucius Cafilisch. Geneva: Publications de l'Institut Universitaire de Hautes Etudes Internationales, 1989. Pp. 1636. Indexes.

The volume under review is the fifth in a series that began publication in 1961, and was then welcomed by Leo Gross in this *Journal* with the observation that "[t]o say that this volume and its successors will become indispensable tools for research is saying the obvious."¹ In such circumstances, a reviewer might feel no more was needed than to salute the latest installment and to add (as is certainly the case) that it lives up to the high standard set by its predecessors. However, since nearly thirty years have

passed, and the last decisions of the Permanent Court, the raw material of the series, were given over fifty years ago, it is perhaps time to take stock.

The distinguishing characteristic of the series is that it includes, for each subject studied, not only the appropriate dicta taken from the decisions of the Permanent Court of International Justice (PCIJ), but also extracts from the pleadings and oral argument of the parties before the Court. Professor Guggenheim, the begetter of the series, gave three reasons for this approach: first, the material contains "opinions often emanating from recognized authorities in the field of international law which, had they appeared in books or articles, would today form part of *doctrine*, and be well known as such" (vol. 1, p. ix). Second, for practitioners the material demonstrates the art of pleading before the Court, a tradition that should be better known. Third, the dicta are known only in a "static" way, yet study of the history of the case in which they were made makes it possible "to see how, through the contradictory arguments of the Parties, the solution given by the Court is arrived at," and "which of the Parties' arguments were upheld by the Court, which were rejected, or how it gave its judgment by following its own line of reasoning, disregarding that of the Parties" (*id.* at x).

Little authority, however, can be attached to the written pleadings of a party, prepared *ad causam*, and anonymously; only signed consultations and the oral argument presented personally by distinguished lawyers can rank as doctrine. And even here caution is indicated: if Professor X, as counsel for Ruritania, asserts that the rule of law is such-and-such, does this necessarily signify that he would make the same assertion, with the authority of his chair, in a book or in a lecture at the Hague Academy? Professor Guggenheim recognized this difficulty, and suggested that it is outweighed by the fact that the parties, in seeking to convince the Court, will "be guided by marked concern to employ what they regard as the most rigorously correct and well-founded argument" (*id.*). There is, of course, the need for consistency: the present reviewer can recall only one case in which counsel addressing the Court contradicted a textbook he himself had written.

¹ 57 AJIL 446, 448 (1963).