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Right v. Might: International Law and the Use of Force

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International law, like a character in an Ingmar Bergman film, is haunted by doubts about its own existence. This existential angst deepened in the United States during the 1980s, as President Reagan unabashedly pursued goals abroad through military force. The President sent Contras and ship mines to Nicaragua, ordered an invasion of the Caribbean island nation of Grenada in 1983, and directed the 1986 bombing of Libyan cities. He did so despite the United Nations Charter's explicit prohibition on "the threat or use of force"[1] except in case of "self-defence if an armed attack occurs."[2] Popularly dubbed the Reagan Doctrine, this increased willingness to use force renewed what David Scheffer of the Carnegie Endowment for International Peace, in the introduction to *Right v. Might,* calls "the great American debate — namely, how to promote democracy overseas, combat terrorism, and remain faithful to the rule of law" (p. 1).

Right v. Might contains a scholarly microcosm of this unsettled debate. Between 1985 and 1988, the Council on Foreign Relations, a New York-based, nonpartisan organization, sponsored seven meetings of American international lawyers, political scientists, historians, state department officials, and journalists. The group also included Steven Schwebel, a judge on the International Court of Justice, and U.S. Senator Daniel P. Moynihan (p. 108-09). These participants discussed whether international law on the use of military force really exists, what its contours are, how just it is, and whether the United States should try to change it. On these difficult and politically charged questions, the Council's John Temple Swing tells us in a brief foreword to the book, little consensus arose "beyond general agreement on the proposition that 'the rule of law' does matter. The differences lie in how that 'rule' is defined" (p. xi).

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1. This prohibition is in Article 2(4), which states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

U.N. CHARTER art. 2, para. 4.

2. The exception is contained in Article 51:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51.

Rather than summarize the contentiousness, the Council instead published the views put forth by several of the meetings' most distinguished participants. First, Jeane Kirkpatrick, President Reagan's representative to the United Nations from 1981 to 1985, and Allan Gerson, who served her as U.N. counsel during those years, define and defend their concept of the Reagan Doctrine.[3] Second, Professor Louis Henkin of Columbia University counters with his own definition of the Reagan Doctrine and contests both its legality and its wisdom (pp. 37-69). Third, Stanley Hoffmann, a Harvard European studies professor, describes the doctrine's effect on important bilateral and extra-legal rules that restrain the superpowers' use of force (pp. 71-93). Finally, William D. Rogers, an undersecretary of state during the Ford Administration and now an international lawyer, suggests ways to deal with states' unwillingness to be constrained by legality when facing "crises that touch on their national interest and security."[4] The result is an interplay of ideas that illuminates deep ambivalence regarding the legality, morality, and inevitability of American use of military force.

In the first essay, "The Reagan Doctrine, Human Rights, and International Law," Kirkpatrick and Gerson define the Reagan Doctrine as a moral and quasi-legal justification for American assistance of foreign peoples' "self-defense" (p. 31). The United States, they argue, legally may offer military support to insurgencies that battle nondemocratic governments maintained by force or by foreign arms (p. 20). Such support, however, must be limited to "*counter*force and *counter*intervention" (p. 31; emphasis added); that is, it is valid only where lack of reciprocal adherence to U.N. Charter Article 2(4) has rendered international law feckless. Thus when state A unlawfully intervenes in state B, the doctrine asserts, the United States need not unilaterally comply with the law, but may intervene in state B also.

The invasion of Grenada, therefore, Kirkpatrick and Gerson argue, had nothing to do with the doctrine, because it was justified directly by a treaty, an official invitation, and American self-defense — the rescuing of American medical students. Instead, the doctrine justified military support for Contras in Nicaragua, Mujaheddin in Afghanistan, and UNITA forces in Angola.[5]

Kirkpatrick and Gerson list four justifications for such support. First, nondemocratic governments maintained by force or by foreign arms are not legitimate: "the Declaration of Independence . . . insists

3. Pp. 19-36. *See also* 1 J. KIRKPATRICK, LEGITIMACY AND FORCE: POLITICAL AND MORAL DIMENSIONS (1988) [hereinafter LEGITIMACY AND FORCE].

4. P. 103. *See* pp. 95-107.

5. *See also* J. KIRKPATRICK, *The Reagan Doctrine III,* in 1 LEGITIMACY AND FORCE, *supra* note 3, at 440 (1988).

that *legitimate* government depends on the consent of the governed."[6] Second, support for foes of illegitimate governments is rooted in great Western political philosophy. Immanuel Kant encouraged "intervention to bring down despotic governments,"[7] Kirkpatrick and Gerson argue, and they quote John Stuart Mill's proclamation that "[i]ntervention to enforce non-intervention is always rightful, always moral."[8] Third, they find support in American history. "The Reagan Doctrine," they argue, "supports the traditional American doctrine that armed revolt is justified as a last resort where rights of citizens are systematically violated" (p. 20). It is simply a more refined successor to the communism-containment strategies of Presidents Truman and Kennedy, and to "America supporting freedom" in the Vietnam War — a cause for which Americans need not apologize (p. 28).

Fourth, and most important, Kirkpatrick and Gerson point to the "whole purpose" of the U.N. Charter (p. 25). It is not only to maintain peace, they write, but also to promote states that "respect human rights (which encompass democratic freedoms)" (p. 25). Article 2(4)'s prohibition on the use of force, therefore, must be read both narrowly and in concert with human rights provisions. It is not *qualified by,* they argue, but rather is "*complementary to* Article 51 (which affirms the inherent right to individual or collective self-defense) . . ." (p. 25;

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6. P. 21. Kirkpatrick also has argued this point emphatically elsewhere:

> A government which takes power by force, and retains power by force, has no *legitimate* grounds for complaint against those who would wreak [sic] power from it by force.
>
> And a government whose power depends on *external support* has no legitimate grounds for complaining that externally supported force is used against it.
>
> *Obviously it is legitimate for the U.S. to support an insurgency against a dictatorial government that depends on external support.*

J. KIRKPATRICK, *The Reagan Doctrine II,* in 1 LEGITIMACY AND FORCE, *supra* note 3, at 432, 437 (1988).

7. P. 33. Kirkpatrick and Gerson unfortunately do not offer a specific citation from which they derive this questionable conclusion. In the same paragraph they cite Kant's essay *Eternal Peace* for his belief that "[t]he civil constitution in each state should be republican." P. 33. Kant, *Eternal Peace, reprinted in* C. FRIEDRICH, INEVITABLE PEACE 241, 250 (1948). But in that work, Kant also describes as a prerequisite to peace the rule that "[n]o state shall interfere by force in the constitution and government of another state." *Id.* at 248. He sees an exception, but only when a state "because of internal dissension should be split into two parts, each of which, while constituting a separate state, should lay claim to the whole." Intervention would then be justified, because "that state would then be in a condition of anarchy." *Id.* Barring such anarchy, however, "the interference of outside powers would be a trespass on the rights of an independent people struggling only with its own inner weakness." *Id.*

This passage does less to support Kirkpatrick and Gerson than it does merely to suggest that in 1795 Kant understood "interference" as something very different from the "intervention" his 1989 interpreters write about. Nicaragua in the early 1980s, for example, arguably was not "split into two parts" and "in a condition of anarchy." Kant, therefore, might have opposed U.S. interference. On the other hand, neither did Nicaragua's internal dissension, if fomented by interfering Marxists, constitute "an independent people struggling *only* with its *own* inner weakness." *Id.* (emphasis added). Whether Kant therefore would have seen no "trespass" in U.S. funding of the Contras is unclear.

8. P. 19. This quotation comes from J.S. MILL, *A Few Words on Non-Intervention,* in 21 COLLECTED WORKS 111, 123 (1984).

emphasis added). Through this reasoning, they derive the legality of military support for "freedom fighters."

This partisan reading of the U.N. Charter is the demon that Professor Henkin attempts to exorcise in his article, "Use of Force: Law and U.S. Policy." He agrees with Kirkpatrick and Gerson that the Charter unequivocally supports democracy and human rights over totalitarianism. But to endorse these ends, he adds, is not to endorse all means to achieve them: *"With respect to the use of force,* the Charter is *neutral* between democracy and totalitarianism" (pp. 62-63; emphasis added). For the Charter's drafters, Henkin writes, "Peace was the paramount value" (pp. 38-39). It was "more important than progress and more important than justice," because its opposite, 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" (pp. 38-39). Under the Charter, therefore, pursuit of justice alone can never justify military intervention; freedom takes a back seat to peace. Thus arguments like those of Kirkpatrick and Gerson, Henkin writes, may be morally appealing, but are legally irrelevant.

The Reagan Doctrine, Henkin argues, stands the Charter on its head. It simply "asserts the right to use force to impose or restore democracy where communism threatens" (p. 68 n.29). Yet the only internationally accepted use of force is "humanitarian intervention" — basically, a state freeing its own citizens held hostage. Even then, such intervention is "strictly limited to what is necessary to save lives" (p. 41), a limitation that, for example, the United States ignored by invading and occupying Grenada. Thus the Reagan Doctrine, as Henkin portrays it, is the mirror image of the Brezhnev Doctrine, which the Soviet Union used to justify invasions of its neighbors. "As a matter of *law,* one cannot justify the U.S. action in Grenada or support for the contras and condemn the Soviet Union's [1968] role in Czechoslovakia" (p. 56; emphasis added).

Right v. Might's third essay, Professor Hoffmann's "Ethics and Rules of the Game Between the Superpowers," purposefully omits arguments over legality. "[I]nquiry into the ethical aspects of the rules of the game between the superpowers," Hoffmann explains, "will reveal even more [than legal inquiry] about where the Reagan Doctrine is leading American foreign policy and whether that direction is the preferable one" (p. 71). Hoffmann's inquiry, however, is a rather muted summary of views presented in his earlier works,[9] and a weak flame to follow the sparks that flew between the preceding essays.

9. *See* S. HOFFMANN, DUTIES BEYOND BORDERS: ON THE LIMITS AND POSSIBILITIES OF ETHICAL INTERNATIONAL POLITICS (1981); S. HOFFMANN, JANUS AND MINERVA (1987); Hoffmann, *International Law and the Control of Force,* in THE RELEVANCE OF INTERNATIONAL LAW 21 (K. Deutsch & S. Hoffmann, eds. 1971).

Hoffman's ethical conclusion can be simply summarized: (1) The superpowers' rules governing relations with each other are basically good. These rules have largely prevented major crises and have allowed resumption of arms-control attempts. (2) The superpowers' rules governing their relationships with other countries are predominantly bad. These rules leave the Third World impoverished and allow belligerent states freedom to pursue their own interests militarily or through terrorism.

Using this framework, Hoffmann condemns the Reagan Doctrine. It is "nothing but a new, warmed-over version of the old roll-back doctrine" of fighting to topple communist governments and install pro-American successors (p. 90). By viewing the whole world, minus the established Soviet bloc, as an American sphere of influence, he writes, it weakens what is good and strengthens what is bad in the existing superpower balance. First, it threatens to upset that balance, which thus far has prevented World War III. Second, and more important, it "impose[s] extremely heavy costs on the innocent populations that would be the victims of the . . . insurrectionary movements we support[ ]" (p. 90). In short, its "likely effects are neither order nor peace nor democracy" (p. 90). The more ethical solution, Hoffmann rather vaguely concludes, is "to put bargaining ahead of unilateral action" and cooperate with the Soviet Union to strengthen mutual restraints on the use of force (p. 92).

The final essay in *Right v. Might* also looks beyond existing law. In "The Principles of Force, the Force of Principles," William Rogers warns of a growing, irreconcilable ambivalence in interpretations of the U.N. Charter. Its prohibition on force is "a principle . . . firmly based on sovereign separateness," yet its simultaneous championing of human rights has thrust it into an area which today is "no longer exclusively domestic . . ." (p. 102). The result is fundamental confusion: "We are more puzzled now than ever about the contours of the principle [of self-defense]."[10]

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10. P. 101. Such puzzlement is not new, however, nor is it confined to the problem of self-defense. Over twenty-five years ago, Richard Falk observed that

> [a]mong the most serious deficiencies in international law is the frequent absence of an assured procedure for the identification of a violation. . . . This inability to identify violations is especially prominent when the action is performed by a leading international actor who is able to block censure resolutions in the political organs of the United Nations.

R. Falk, *The Adequacy of Contemporary Theories of International Law — Gaps in Legal Thinking,* 50 VA. L. REV. 231, 249-50 (1964).

Other commentators, too, have noted this particular source of confusion and its seriousness. Jost Delbrück warns that "[a]lthough increasing international concern for human rights is welcome, justification of the international use of force in the cause of human rights may well lead to a complete breakdown of the prohibition of the use of force . . . ." Delbrück, *Collective Security,* in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 104, 112 (1982). And Myres McDougal adds that "[t]he number one problem of humankind remains . . . establishing a *minimum* order, in control of unauthorized coercion and violence, which will permit more effective pursuit of an *optimum* order." McDougal, *International Law and the Future,* 50 MISS. L.J. 259, 311 (1979) (emphasis added).

Non-Charter law, therefore, must plug the gaps. Like Hoffmann, Rogers sees hope in superpower cooperation. His proposal, too, is more precise. He suggests bilateral rules, "fact-specific and limited in time and space" (p. 106), negotiated between the United States and the Soviet Union to regulate pressing conflicts. The best example to date is the agreement that ended the 1962 Cuban Missile Crisis. Such specific rules offer the most promise because, first, "[t]he actual conduct of foreign relations . . . is more fact-specific than principle-oriented" (p. 105). Second, such rules can cure the generality and ambiguity of the Charter. Rogers acknowledges both the current rarity of such specific agreements and the difficulty of creating them. Nonetheless, he believes, doing so in the 1990s may be "[t]he real work of providing a law to restrain the use of force . . ." (p. 107).

The proposals of Rogers and Hoffmann are commendable, but unsatisfying. Both writers leave unanswered the very question that Kirkpatrick and Gerson forcefully raised: what should the United States do when the Soviet Union will not cooperate, or — even more perplexing — when it must deal with a country that does not take orders from Moscow? The Cold War — currently melting — is not the only conflict that challenges America to use force, and superpower policing cannot be the only answer.

Right v. Might does not offer original theories on the proper role of force in international relations. But it does present succinct perspectives, fleshed out by a helpful list of suggested readings (pp. 111-18), on an enduring political and legal clash. These perspectives help analyze both the recent U.S. invasion of Panama and the Soviet refusal to intervene in Romania and elsewhere in Eastern Europe. In addition, by illustrating the necessity of defining international law broadly and of examining its political and ethical character, *Right v. Might*'s authors offer even in their disagreements a useful, albeit paradoxical, affirmation of its existence.

What is most intriguing about *Right v. Might,* however, is the conspicuous shadow that falls across it — the shadow of Soviet leader Mikhail Gorbachev. Rogers quotes him (p. 103), Hoffmann pleads for imaginative responses to his innovations (p. 91), and Kirkpatrick and Gerson assert an already disproved belief that the Soviet Union will not allow one-party rule to end in Eastern Europe (p. 29). Only Henkin leaves Gorbachev alone, focusing dutifully on the law. For the moment, however, politicians and diplomats — more so than laws — appear to be driving superpower relations. Gorbachev's twists, and President Bush's turns in response, may make the Kirkpatrick-Gerson defense of intervention less compelling, Henkin's legal analysis too narrow, and the indistinct but hopeful proposals of Hoffmann and

Rogers more realistic. They also may inspire a new round of the "great American debate." *Right v. Might* may require a sequel soon.

— *Craig T. Smith*