REVIEW ESSAY

# LOOKING OUT FROM THE INSIDE

## The Kirkpatrick Mission: Diplomacy Without Apology: America at the United Nations 1981-1985

**by Allan Gerson**

New York: The Free Press, 1991, 317 pp., with notes and index, $22.95 cloth.

Reviewed by Alfred P. Rubin

Jeane Kirkpatrick was appointed United States Permanent Representative to the United Nations in 1981 and held this position until the close of 1984's General Assembly. Allan Gerson served as the Permanent Representative's lawyer during this period. This is his memoir, his personal perspective of those controversial years, when the government of the United States under the Reagan administration felt that it stood alone defending principle. Gerson's admiration for Ambassador Kirkpatrick is great. His appreciation of the assertions of law and policy coming from the Department of State bureaucracy (including the political appointees of the Reagan administration) is considerably lower. He is open in his evaluations and the reasons for them and has produced a work which is straight-forward, readable, opinionated, and fascinating. Because this book is a real "insider's" view, with all the strengths and weaknesses implicit in that genre, it is great reading for people interested in what life is really like in the front lines of the foreign policy establishment.

I must say at the outset that I have known Allan Gerson for more than twenty years. We disagree about many things, but remain friends. Because I have always found Gerson's views to be expressed openly and honestly, I do not think this review, as sincere and balanced as I can make it, will jeopardize that friendship.

The first substantial episode that Gerson recites involved Israel's "self-defense" bombing of Iraq's Osirak nuclear installation in June 1981. The Security Council, without an American veto, had just voted to condemn the bombing as a violation of the U.N. Charter. Article 2(4) of the Charter, which is binding as a treaty on all U.N. members, is a general prohibition on the threat or use of force.

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Israel's defense had been that the bombing came within the exception, allowing states to use force for "self-defense" (Article 51). But that exception literally applies only "if an armed attack occurs," and no armed attack by Iraq against Israel had recently occurred. Within the U.S. Mission to the United Nations (USUN), there was substantial debate concerning Israel's "self-defense" rationale. Gerson disagreed with the Counsellor for Legal Affairs and with the Deputy Legal Counsel. As he describes it (pp. 14-17), the two experienced State Department lawyers considered the Israeli attack a clear violation of the U.N. Charter. Gerson's counterargument is based on what he regards as the "contextual" approach to treaty interpretation learned as a graduate student at Yale Law School: that the Israeli action was reasonable taking the political and military circumstances into account and therefore it could not be illegal. The parties to the Charter could not have intended to require a state to wait until it was hit by a nuclear weapon before acting to defend itself.

Notably missing from Gerson's review of the argument on both sides is any hint of either party reading Article 51 in its full treaty context. He perceives the professionals as having read it only as isolated words devoid of context, while he appears to have read it as if the words made no difference, as if treaties are not binding if they work against the political or military interest of a party.

There are two obvious responses. First, it was not necessary to hold the Israelis legally free to bomb the Osirak reactor in order to have found their action politically, militarily, and perhaps even morally justifiable. It is entirely possible to violate the Charter when statesmen consider violations to be in the interest of their constituents. The legal result of these violations remains whatever the non-legal rationale for the action might have been. Since the U.N. action that triggered the discussion was in the context of a proposed Security Council condemnation of Israel, and such condemnations are based on moral and political factors as well as legal factors, there was no reason to rely on a legalistic evaluation or to argue that other factors that legitimately enter into discretionary decisions of the Security Council must make legal what seemed patently illegal to many. Second, the Israeli bombing, in my opinion, was legally justifiable under the normal "teleological" technique of treaty interpretation, that is, by reading the section of the U.N. Charter in which Article 51 appears, the entire Chapter VII.[1] The overall pattern, the teleology, of the Chapter is that the Security Council should act to restore international peace and security whenever it determines the existence of a "threat to the peace, breach of the peace, or act of aggression." Article 51 comes into play when an armed attack occurs after a failure of the Security Council to perceive the looming threat to the peace. But at the time of the Israeli attack, Iraq regarded itself as at war with what it called the "Zionist entity" and had uttered repeated threats in violation of Article 2(4). The Security Council failed to act. There was no failure of the Council to perceive

1. I thought the argument suggested here was original until I found it set out in Alf Ross, *The United Nations: Peace and Progress* (New Jersey: The Bedminster Press, 1966), 102-5. The "teleological" technique of statutory, contract and treaty interpretation is routine in civil law systems and to Anglo-American lawyers.

the threat to the peace; there was a failure to discharge its responsibilities by making a formal determination and authorizing the necessary counteraction against Iraq. The idea that the failure of the Security Council to make the formal determination meant that there was no threat to the peace, that, in effect, the threshold for counteraction had not been passed, is a perversion of positivism. It assumes that we live in a *de jure* world of labels, not in a real world of facts.

No lawyer need go that far; indeed, no lawyer familiar with the failures of "non-recognition policy" and other attempts to substitute labels for facts would try to make the argument. Hans Kelsen himself, the great theorist of modern positivism, made it clear that this was not the way the positivist model worked. Yet nobody in the pertinent parts of the U.S. government or, indeed, the Israeli government, seems to have understood it, as the legal positions polarized around two shallow assertions pressed, apparently with great self-confidence, by intelligent and experienced people.

There are many other arguments to blend the Israeli attack into the general pattern of the international legal order. Indeed, Gerson is probably correct in his assumption that any state in Israel's position would have done the same thing regardless of the rigid interpretations of law by those whose lives and constituencies were not at risk.

It is possible to argue, for example, that the "inherent" right of self-defense, mentioned in Article 51 of the Charter, is *jus cogens*, a rule so deeply embedded in international public policy that it can best be seen as a peremptory norm, or a rule that cannot be restricted even by treaty, even by the U.N. Charter. The "inherent right" does not require an armed attack before it can be exercised; the limiting language of Article 51 is inoperative because no treaty can change the rules that are *jus cogens*, thereby overriding the peremptory norms of the legal order.

Gerson blames the dispute on a difference of legal approaches between Yale and more traditional law schools. It cannot be a surprise to those with experience in government that debates among lawyers reflect the biases of their training. It is hard to understand, however, the virtues of any legal training that leads its disciples to favor the abstract models of their teachers and to neglect other useful legal arguments. From this point of view, Gerson's "explanation" is a condemnation of his own mentors' rigidities.

Another example of official shallowness came towards the end of Gerson's tenure, when U.S. officials tried to evaluate the legal risks and options implicit in the Nicaraguan case filed with the International Court of Justice (ICJ) after American involvement in mining Nicaraguan waters and other actions to support the "contras" in Nicaragua became undeniable. Ambassador Kirkpatrick concluded that there was no point trying to persuade the ICJ with logic and law to rule in favor of the United States, apparently because the judges were elected by the General Assembly (p. 264, supported by Gerson on p. 266). That is like saying that the U.S. Supreme Court must always be expected to rule in favor of the President and the Executive Branch or the Senate, at the expense of the states, the House of Representatives and individual liberties. On its face, the assertion is absurd and to those who know judges on the ICJ personally, it is

insulting.[2] Moreover, Gerson never mentions the possibility of arguing before the ICJ that its own integrity was involved in the Nicaraguan complaint, citing the 1954 Monetary Gold Case[3] as a persuasive precedent in which the ICJ refused to hear a complaint for lack of a "necessary party." In the Nicaragua Case, the "necessary party" was El Salvador.

In fact, the United States did argue that our actions against Nicaragua were part of a collective self-defense activity to protect El Salvador from armed Nicaraguan subversion. However, El Salvador, while offering to argue the United States' position in the jurisdictional phase of the case (the ICJ, probably improperly, refused to hear the redundant argument), made it absolutely clear that it would not join in the merits phase. The ICJ lacks the process to force a recalcitrant "necessary party" to appear. The United States' argument lost in the jurisdictional phase of the case, as indeed it should have (the ICJ has frequently considered "justiciability" to be not a matter of "jurisdiction," but a preliminary question joined to the merits). The United States, apparently with Gerson's concurrence, refused to argue the merits phase.

What makes this bickering peculiarly enlightening to those interested in how American legal policy is made is that the apprehensions of Kirkpatrick and Gerson about the ICJ's likely decision were correct. Although the reasons they gave seem worse than unpersuasive, it has been clear to many that the judges in the ICJ, honorable as they undoubtedly are, have a model of the legal order in their collective minds that is very different from the model in the minds of the statesmen whose consent is the essence of the law-making process of the international legal order.[4] The issue is too complex to be analyzed further here;

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2. Gerson seems to realize this. After making the assertions noted above, he also writes: "There were a number of Western judges on the bench who could hardly be accused of being the products of Third-World political machinations against the United States. But it wasn't a matter of individuals being ideologues. It was that on a political issue splitting East from West, the World Court as an institution would reflect the dominant politics in the General Assembly"(p. 269). There is much to discuss in this: whether the institutional bias of the Court is a reflection of the politics of the General Assembly or of the rules of international law enshrined in the UN Charter and other sources of public international law. It is, after all, possible that the United States had indeed violated the rules of international law in its activities in Nicaragua, whatever the political and military excuses. Since the United States claimed to be acting in "collective self-defense" with El Salvador, without El Salvador presenting its case, it is impossible to tell whether the United States rationale was legally supportable. Cf. Dissenting Opinion by Judge Schwebel in *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240 at 329, esp. 332-35. In any case, the presence of two inconsistent assertions in Gerson's text does not lend to clear analysis.
3. *Case of the Monetary Gold removed from Rome in 1943* (Preliminary Question), *I.C.J. Reports 1954*, p. 19.
4. See Alfred P. Rubin, "The International Legal Effects of Unilateral Declarations," *American Journal of International Law* 71(1) (1977): 29-30 for a recommendation as blunt as the editors of the Journal would permit that the United States withdraw its general submission to the court's jurisdiction in light of the court's confusions as to the structure of the legal order. Had that article been read seriously by American statesmen, the embarrassments of the attempt to withdraw our submission to the jurisdiction of the ICJ only after we had learned that Nicaragua was about to file its case against us would have been avoided, and a salutary warning would have been given the court. Today, the court's docket is busy, but the cases before it involve matters in which certainty is more important than winning, like maritime boundaries. Serious cases, like Libyan

these few sentences already carry the argument far beyond the superficialities that Gerson sets out as the essence of the argument within the inner circles of the United States government at the time.

Weaknesses in American legal argumentation had many immediate effects in the United Nations during the exciting period from 1981 to 1984. Gerson tells about the Falklands/Malvinas war, the Israeli invasion of Lebanon in 1982, the exclusion of the United States from ECOSOC's Statistics Committee, and many other diplomatic crises. Of particular note, illustrating American confusion as to the role of law in international affairs, was the General Assembly's condemnation of the United States for extraditing to Israel an accused "terrorist," Ziyad Abu Eain (pp. 69-80). Eain was a young Palestinian accused of planting a bomb near a bus stop adjacent to a public garden in Tiberias, a resort town in northern Israel. The public debate centered on his motive (national self-determination for the Palestinian people). Apparently the officials of the Reagan administration never noticed that his action would have been categorized a "war crime," possibly even a "grave breach" of the 1949 Geneva "Civilians" Convention to which nearly all U.N. members are parties, by those who believed the laws of war apply to such struggles. The "handing over" of an accused "grave breacher" or war criminal has nothing to do with the object of the struggle or the purity of heart of the accused. Thus, the constituencies concerned with the integrity of the laws of war were left free to vote against the United States in clear conscience, and those urging that "national liberation" struggles be brought automatically under the rule of the laws of war were not confronted with the hypocrisy inherent in their rhetoric.[5]

But Gerson's book is not a text in how the approaches to international law taken by the Reagan administration were self-defeating and therefore ineffective to support policies arrived at without legal consideration. It is a major contribution to an understanding of daily life in the United Nations at a time of hypocrisy. The major hypocrisies were not those of the United States, but those of our allies and associates around the world. The prize might belong to Egypt, whose representative is reported by Gerson to have said that "we didn't mean what we said" when condemning the American invasion of Grenada; the statement was made ostensibly to secure Egyptian anti-colonial credentials in the struggle for influence in the non-aligned movement (pp. 223-24). The prize might go instead to France, which adopted a position apparently solely to provoke an American veto in the Security Council in order to create "the appearance of independence from the United States" for the sake of evanescent influence in the Middle East (p. 160). Instead of helping to bring peace, as the Norwegians did by mediating an accord between Israel and the PLO in 1993,

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and Iranian complaints against the United States for various activities, seem more political moves than attempts to reach a judicial settlement. See, for an analysis of the Libyan complaint in context, Alfred P. Rubin, "Libya, Lockerbie and the Law," *Diplomacy & Statecraft* 4(1) (1993): 8-13 especially.

5. Such lines of legal reasoning were brought to the attention of responsible officials at the time; see Rubin, "Extradition of Terrorists, Case Note on *Eain* v. *Wilkes*," 15 *International Prac. Notebook* 15 (1981): 10-11.

France assumed that implacable hostility in the Middle East was part of the immutable legal and political order, and sought minor advantages at the expense of French honor. There are so many other examples of hypocrisy that I forbear to go on. It is certainly clear that Gerson's and Kirkpatrick's threshold for tolerating hypocrisy, normally considered to be much too low, is in fact much higher than mine.

Aside from the daily grappling with hypocrisy, there was the problem of authority within the American government. It is sad, but part of the experience of any person working in a bureaucracy, governmental or other, is that a disproportionate amount of the energy of intelligent and insightful people must be spent fighting to maintain their authority against the machinations of others whose interests are more in the trappings of power than in discharging their duty. The struggle to maintain Jeane Kirkpatrick's authority under the president, acting through the secretary of state, to determine American policy towards the United Nations was endless. The precise terms of her mandate leave the issues unclear, probably deliberately.[6] But it is distressing to read how a dispute between Kirkpatrick and Elliott Abrams, then Assistant Secretary of State for International Organizations Affairs, did not involve substance: "They differed over power: who would control and who would be subservient to the other" (p. 66). This situation was alleviated temporarily in 1989 with the appointment of a superbly able career State Department officer, Thomas Pickering, to the post which in Gerson's time had been held by Jeane Kirkpatrick and Vernon Walters. Gerson seems to regard Pickering's appointment as a defeat for the authority inherent in the post (pp. 283-84). I suspect that Pickering regards it as a victory for rational policy as his opinions were sought and respected by the secretary. In a way, both are right.

There are a number of facts recited in the book which give a touch of reality to these abstract arguments. For example, it has been obvious for many years that with few exceptions (including some speeches by Ambassador Kirkpatrick) the speeches given in open Security Council meetings are set pieces having very little to do with real debate and much to do with home audiences and soundbites. Gerson's book contains the first published mention that I have seen outlining the institution of "informal consultations" held routinely "in the long narrow rectangular room, barely wide enough to accommodate one representative and two aides from each delegation, that adjoined the formal and very august Security Council chambers. . . . The formal U.N. Security Council proceedings would prove to be the staged event, the script already worked out in the 'informal consultations.' "(pp. 136-37).

Unfortunately, there are also a number of "facts" that are incorrect. Most are

6. The official statement of the authority of the USUN Representative is carefully ambiguous. Gerson does not go into its history and for a "contextualist" the elision is odd. It might be worth mentioning here that the appearance of independence derives from the insistence of Adlai Stevenson, who took the appointment under President Kennedy only if he could maintain his intellectual honesty and not be a mere parrot for policies reached in his absence by others. As people with less public prestige than Stevenson were successively appointed to that post, the authority of the representative was gradually eroded.

minor except to purists, but others might lead students astray: The General Assembly's infamous resolution of 10 November 1975 that "determines that zionism is a form of racism and racial discrimination" did not pass by a vote of 67 to 55 with 15 abstentions (p. 31) (that would not have amounted to the two-thirds necessary to pass a substantive resolution in the General Assembly). It passed 72 to 35 with 32 abstentions. Congress does not work "in conjunction with the United States Government" (p. 177); Congress is part of that Government and it is a common grotesquerie that confuses our friends and others that members of the Executive Branch of our Government frequently forget who pays their salaries. Congress does not ratify treaties (p. 183), nor does the Senate (p. 185); the President ratifies treaties with the advice and consent of two-thirds of the Senate.

In sum, this is not a deep book, and certainly not a useful text for learning how the international legal order affects U.S. policy in the United Nations. It is instead a superbly readable account of how decisions involving international law were made at high levels in the Reagan administration and how the hypocrisies of the United Nations were most effectively challenged, not by using tools that public international law places in the hands of our foreign policy elite, but by some straight talking and adherence to comprehensible moral principle. It is a confirmation of Sir Harold Nicolson's aphorism that "'moral' diplomacy is ultimately the most effective, and that 'immoral' diplomacy defeats its own purposes."[7]

Like Nicolson's observation, Gerson's book has little to do with public international law. It is also possible to disagree with the "moral" argumentation that formed the basis for much of the policy presented by Gerson as if based on law. But it is impossible to deny the power of moral argumentation no matter how presented to a forum sodden in hypocrisy. From that, "realist" theorists might be able to draw some lessons.

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7. Sir Harold Nicolson, *Diplomacy*, 3rd ed. (1963; reprint, Oxford: Oxford University Press, 1968), 23.