

BOOK REVIEWS

Diplomatic Protest in Foreign Policy, Analysis and Case Studies, by Joseph C. McKenna, S.J., Chicago, Loyola University Press, 1962. 222 pp. (with Bibliography and Index).

This is the first entry of "Jesuit Studies, Contributions to the Arts and Sciences by Members of the Society of Jesus" into the field of foreign policy and its penumbrae of international law and diplomatic practice. It is notable for the caution and modesty of the work plan, and of the formulation of its conclusions. It is no less so for the thorough marshalling and analysis of materials within the plan adopted, and for the sensitiveness to the wider context of particular incidents which Father McKenna's writing constantly displays.¹ Also, this is the first systematic study, known to the present writer, of the range and effectiveness of the use of "the diplomatic protest" by Washington, despite the nearly 600 recorded instances in the 14 years of the present century selected for survey by the author.

The framework used by Father McKenna is to present what may be called Washington's protest-activity in selected spans within the period 1900-1930. During this period the United States moved from the status of a middle to a major power, and from a steady though an uneasy isolationism, broken by its intervention as a belligerent in World War, to the threshold of the contemporary era when it seems inevitably involved not only with the affairs of Europe, but with those of all the continents (31-54). Within this period he selected for examination three spans. The first is 1900-1903 as the debut of the United States into a world role during a period of relative absence of tension. The second, 1913-1918 as marked by Democratic party control in uneasy peace and war, first as neutral and then as belligerent. The last is 1927-1930, marked by Republican return to office, in an era of international hopefulness and isolationism quickly to be overcast by economic depression and nationalism. Within each span and the period as a whole, the author makes a broad comparative analysis of total protests, by reference to their subject-matter, to the states to whom these were directed, and their outcome in terms of "Success" and "Failure" or "Doubtful" (37-45). And he pays some special attention to cases where, because the addresses of protests were undergoing social or political trauma (for example, of revolution or war) the level of successful outcomes was at its minimum (46-48).

Each of the six remaining chapters is devoted to analysis in greater depth of a particular issue which has given rise to United States protest, mostly (but not wholly) during the same period. For each case the author provides an adequate context of legal and political history to frame the diplomatic exchanges, and examines these exchanges in that context in an effort to answer four groups of questions. First, what were the policy objectives and expectations of

¹ The book is a "drastically revised" version of work for a doctoral degree at the Yale Graduate School. There is nevertheless a freedom (which many readers may welcome) from the now almost stereotyped terminology of analysis associated with the work on "international legal policy" at the Yale Law School.

those who framed the protest, including those extraneous to the particular subject-matter of protest? And what level of importance did he attach to them? Second, how far did they envisage the costs implied in making the protest, either in resistance and loss of goodwill from the state protested against, or in terms of the need for follow-up measures by the protesting state? Third, what was the degree of achievement of the objectives? Fourth, what were the actual costs of that level of achievement? It is on the composite of these answers on which he essays to base his judgments as to success or failure, and his diagnosis of the conditions contributing thereto.

In this way he approaches the famous U.S.-U.K. controversy as to neutral rights on the high seas, 1914-1916, and its anticlimatic denouement when the U.S. later co-operated as a belligerent in the measures which it had protested as a neutral, and its epilogue in the post-war settlement—when Spencer Phoenix finally reduced the cases on file at the State Department from 2,658 to 11, involving total claims of only 3 million dollars. It is a tribute to Father McKenna's determination not to be balked by the self-evident that he is nevertheless able to intersperse his account of the details of this matter with wise homilies affecting the particular decisions, the processes of reaching them, and the factors properly taken into account or neglected in making them (54-90).

Chapter V, on the Rumanian Mining Act, 1929 (90-116) chooses a protest situation typifying the chronic conflicts of national claims to freedom of action in exploiting oil and other resources, with the assumedly vested interests of foreign oil companies, supported by Governments diligent to protect their nationals against confiscatory discrimination (90-116). Chapter VI is devoted to American efforts to secure redress for the maltreatment of American nationals in the Nanking Incident of 1927. It is selected for an analysis (which is wide as well as deep) because it illustrates the operation of protest at a point of convergence of revolutionary Right-Left struggle within China, of inflamed nationalism challenging humiliating privileges extracted from China by Western pressures, and of domestic internal struggle within the United States surrounding reappraisal of its policy toward the emergent modern China (117-142).

Chapters VII and VIII, similarly, respectively present the U.S.-Canadian controversy concerning the alleged discriminatory and inhumane treatment of American citizen John O'Brien in the penitentiary of Kingston, Ontario (143-167), and the alleged violation by the Soviet Union of the Litvinov pledge of November 1933 not to permit on its territory any organization (or activity of such) aiming to alter by force the political or social order of the United States (168-193). The former is well chosen to illustrate the factors operative in relations between neighbours so friendly that frontiers are open and war virtually inconceivable. The latter illustrates the value (or lack of it) of the protest in relations between nations which, after years of inflamed relations, are seeking to find what would now be called a basis of coexistence while maintaining their ideological positions.

While aspects of the diplomatic history and the international law problems surrounding some of these cases have often been examined in the literature of international relations and law, they have not been examined from the viewpoint taken by Father McKenna. With admirable clarity and acumen, accompanied by official documentation, he steadily brings the available data to bear upon the focal question, whether and in what circumstances diplomatic protest (whether "formal" or "informal") is an *effective instrument of foreign policy*. And he breaks up this focal question into intelligible and significant sub-questions, to which he offers answers within the treatment of each case with a consistency which might have become somewhat tedious, but for his easy style, and his interesting background presentation. And all this allows him to write a concluding chapter which is rather a model in its relation to what has gone

before (194-203).

No doubt there are other interesting questions concerning the diplomatic protest to which the author might have addressed himself, such as, for example, its function in relation to obsolescence of rules of international law by persistent breach.² These, however, are marginal to his concern; the field he has chosen is coherent in itself, and he has ably performed the task which he set himself within it. The book should have a valued place on the shelves not only of international lawyers, political scientists and students of international relations, but also (and above all) on the shelves of those concerned with the guidance and conduct of a nation's foreign policy.

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A Treatise on the Conflict of Laws, by A. A. Ehrenzweig, Walter Perry Johnson Professor of Law in the University of California at Berkeley. St. Paul, Minn., West Publishing Co., 1962. li and 824 pp. (\$10.00 in U.S.).

Few judges have contributed as much as Justice Traynor of the Supreme Court of California has contributed to the development of the conflict of laws. Still fewer have deliberately encouraged and inspired academic research into this difficult but important subject. Consequently it is most appropriate that Professor Ehrenzweig has chosen to preface his work with the following statement by Justice Traynor:¹

In Conflict of Laws, the wilderness grows wilder, faster than the axes of discriminating men can keep it under control. The concepts of the Restatement have been shattered by the devastating attacks of Cook and Lorenzen. . . . The demolition of obsolete theories makes the judge's task harder, as he works his way out of the wreckage. . . . He has a better chance to arrive at the least erroneous answer if the scholars have laboured in advance to break ground for new paths . . .

Clearly this passage was an encouragement to Professor Ehrenzweig. He *has* laboured and he *has* broken ground for new paths. This is an exciting, scholarly text which should be read by every teacher of conflicts because, however learned that teacher may be, he will gain new insights from Ehrenzweig's penetrating analysis. Unfortunately Ehrenzweig will not be satisfied with the plaudits of fellow academics. This book is written with missionary zeal and it is clear that Ehrenzweig believes that he has explained accurately the law which is (and ought to be) administered by the courts. Difficulties arise immediately. Insofar as the author's general theory is represented to be an accurate explanation of American decisions, probably it is misleading. Certainly his theory is not consistent with the decisions of English and Australian courts in conflicts cases. Still more important is the fact that there are considerable objections to the acceptance of the author's general approach at some future date.

In Professor Ehrenzweig's thesis "jurisdiction" and "choice-of-law" questions are intimately linked. In his view a "nascent doctrine of forum

² See, e.g., Julius Stone, *Legal Controls of International Conflict* (1954, revised impression 1958) c. 12.

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¹ At vii.