

THE NATIONAL STATE AND EXTERNAL COERCION: YESTERDAY AND TODAY AND WHAT OF TOMORROW?

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Before I begin my prepared remarks, permit me to extend to this symposium, its organizers, and participants the greetings and gratitude of The American Society of International Law. The Society is giving increased emphasis to wider participation by its membership. Regional meetings and convocations dedicated to the examination of particular aspects of international law contribute much to the achievement of this expectation. Consideration of topics such as those on the agenda of this gathering enrich both international relations and law through the interactions of the participants and the eventual publication of the proceedings. The American Bar Association Committee on Law and National Security, in conjunction with law schools and student bar and publication groups, is making a significant contribution to an urgent need for international order by focusing wider and deeper attention on its condition, needs, and prospects for revival and further development.

After I finish what I have to put before you today along subject matter lines, I have been granted the honor of adding a tribute to the last speaker in this symposium, although to do so might seem as much a work of supererogation as to "introduce" him!

There was a time when the affairs and activities of states and rulers were not the subject of widespread external public evaluation as to their wisdom or propriety. The status of statehood included entitlement to what might be called "inviolable national privacy." State activities, including aspects of foreign policy operations, were not proper subjects for public comment by representatives of other states. Rather, such comments were confined to confidential diplomatic communications, which often did not become widely publicized until the historians eventually went to work on

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(by then) old records. The press, the only form of public communication then existent, did not often pretend to the rank of a fourth estate within the field of international relations, and officials of one state did not customarily comment for publication upon the acts of other states, even when these were of considerable interest in a foreign affairs context.

The evolution of planetary political organization focuses on the legal restraint of the unbridled volition of states. But progress is slow, and ebb sometimes cancels flow. The historic freedom of states to do as they please has on paper—and to a limited, but not unsure, degree in practice—been diminished, particularly in the context of resort to armed force in non-defense situations. However, juridically, states still have a wide range of legal freedom to engage in activities which have regional or global impact. States are not responsible to other states for the consequences of such activities, and they are entitled to reject as intrusive of their “inviolable national privacy” any official public criticism or pressure from other states and, usually, international organizations as well. However, in modern times unofficial scrutiny and pressure by the media are well established. Sometimes other states, through certain of their public attention-seeking instrumentalities, adopt media techniques themselves.

In the old diplomacy, from the year 1250 to an era that began in World War I, there were vast differences between official and non-governmental intrusions into the conduct of a particular state. For centuries states accepted the convention that, while the foreign minister of state X might permissibly speak most explicitly to the foreign minister of state Y about happenings in Y that perturb the expectations or interests of X, no public utterances of a potentially coercive nature would occur. Provided the representative of X did not threaten, criticize, or otherwise diminish Y publicly, Y would tolerate rather than reject the initiative, and begin to weigh its own interests in terms of the possibility of an ameliorating response. However sharp the private assault, the talks were merely described as “frank.”

But consider what has come to be the diplomatic modality of today: the press, the electronic media, the self-appointed pundits of both, scholars, politicians in and out of legislatures, saints and rascals, all insist upon having “their say” and espousing lines of action directed toward the recalcitrant state. What one official says to his opposite number in secret must be formulated with an eye to the “leak” that is almost sure to follow. Foreign public figures,

without actual operations authority or responsibility, express their preferences as to what ought to be done in this or that state. Evaluations are often cast in terms of threatened assertion of support for organized deprivations directed against the government—and perforce the people—of the target state. One need not extol the old way or condemn the new. It suffices to note the new limitations upon traditional diplomacy that the media change has produced. The rise of the non-state public sector focus on state conduct, like other historic shifts such as those that eventually undid feudalism in the West, is apt to achieve a significance that today is not readily or clearly perceived.

In addition to confusing the distinction between official and unofficial sanction systems, the influence of the non-governmental public sector provides new public, essentially non-statist, bases for the critical external scrutiny of state conduct. Even authoritarian and totalitarian states—to bridge for inclusiveness a dubious dichotomy of the moment—have not been able to draw about them the veil of privacy from scrutiny. Thus chiefs of state, heads of government, coupist juntas, and foreign ministers have come to be subjected to the long arm of world scrutiny and externally based pressures with which Elizabeth I, Walsingham, Phillip II, Talleyrand, Napoleon, Alexander I, Metternich, and even Bismarck did not have to contend. There is no effective immunity today from non-governmental scrutiny, despite recent efforts at UNESCO to provide it by provision for exclusive reportorial rights to chosen instruments of national choice.

Meanwhile, even international institutions that were designed to permit some departures from the older principle against public arraignment of a state, such as those of the United Nations Commission on Human Rights and the Economic and Social Council, have been reduced in their effectiveness as impartial, truly international panels of inquiry by biased misuse of the basic, General Assembly-linked voting formula, which is itself directly linked to an ancient political assumption derived from sovereignty that the weight to be given to the will of any state is legally equal to the weight to be given to the will of any other state. The emphasis here is that while non-governmental public intervenors are not limited by jurisdictional notions, international organizations are restricted by their charters as these are “auto-interpreted” from situation to situation.

While it is sometimes true that universal and regional international organizations will exercise their authority to scrutinize, rec-

commend, and in some cases even command as to state conduct, the exercise of these functions seems to be contracting, not expanding. International civil servants tend to become as discreet as old-fashioned diplomats about publicly criticizing states. Thus, the present Secretary-General was surprisingly uncharacteristic when he "spoke out," as the media say, about the decline in effectiveness of the central purpose of the United Nations system, the control of armed violence, because of what member states fail to do. Entities and sub-entities made up of delegates from member states increasingly give evidence that bloc interests, rather than universal interests, are paramount. World statesmen are rare in the international arena today.

Even so eminent a structuralist as Professor Louis Sohn will agree, I feel sure, that the present partial structure of planetary jurisdiction to curb globally inimical state conduct is sufficiently flexible to respond, with more effectiveness than it has so far shown, to the preponderant collective will of states to curb "inviolable national privacy" in a significant range of sectors beyond the use-of-force sector. This seems to be the case particularly as to matters characterized as being of international economic concern. As recent events involving the International Monetary Fund attest, there has been no recession from the post-Bretton Woods precept that a state cannot effectively claim "to be let alone" as to the management of its exchange rate, reserves, and foreign debt. Similar collective manifestations of preponderant group will are only haltingly evolving as to human rights, especially in the broader spheres beyond gross brutalization of persons, such as distributive justice and popular participation in governance.

It is noticed, once one compares what the media say with what governments officially and publicly say, that equilibrium as to the shrinkage of "inviolable national privacy" tends to be established through the expansion of the ambit of collective, preponderant governmental concern, by the will of states, usually through some form of international organization. Thus, there is little or no privacy left as to international economic factors such as trade, balance of payments, and the like.

Unfortunately, the new unifying (as between non-governmental and official scrutiny) universalism in the economic sphere has not been accompanied by advances in the effectiveness of curbs on national volition with respect to the non-defensive use of force, as Secretary-General Perez de Cuellar has pointed out. The ill-advised resort by Argentina to military force in the Falklands-

Malvinas dispute brought about a unilateral response by the United Kingdom, rather than "take-over" of the situation by the Security Council as should have occurred if the United Nations Charter had been followed. It also induced a shocking act of irresponsibility by more than two-thirds of the Western Hemisphere members of the regional anti-force structure. The response to the Falklands-Malvinas episode, while not as complete a victory for volition-curbing as was the action in 1956 involving naked aggression by the United Kingdom, France, and Israel, was better than no significant action at all, as in the case of Indian aggression in Goa and that of Indonesia in South Timor. Nonetheless, alignment with Britain's extended and uncontrolled "right of self-defense" in the Falklands by the European Community and eventually by the United States (departing from its self-appointed shuttle-mediator role) is a far from satisfactory departure from the existing standards of the Charter for resolution of use of force situations.

We see from a brief contemplation of some, and recollection of other, failures that collective denial of "inviolable national privacy" to uses of force by states is sporadic, uncertain, and largely ineffective. Unfortunately, in this situation the media is likewise muted in response, but not for any more serious reason than the fact that aggression is either not news or does not long remain news if it continues.

Meanwhile, a further complication results from the fact that economic sanctions and denials, originally conceived of in the Covenant of the League of Nations and later included in the United Nations Charter as coercive instrumentalities of collective will short of war, have become unilateral tools for the intrusion of one state into the affairs of another. Often, as in the case of flipping on and off economic development assistance, the collective well-being of the people of a state is sacrificed in favor of the foreign perception of preferences or interests. There have been a number of relatively unsuccessful efforts to influence governments to change their ways through unilateral economic denials policies. These efforts, on the whole, are misapplications to inappropriate situations of economic warfare strategies that had effectiveness under totally different circumstances (total war, highly-industrialized, raw materials-deficient, sea lanes-vulnerable, or targets of war-mobilized common purposes between coercing states).

Thus, the present relationship between the national state and external coercion is a confused one. Obviously, we cannot expect the state to wither away soon, or perhaps soon enough, but all

states, not just weaker ones, must be made more amenable to global and regional majoritarian, preponderant, or prevalent interests.

We are far from this goal. If we were only realistic and never idealistic we should all despair. We need to continue to be expectant to a degree that will encourage international influence to recoup lost ground in the effort to control violence, and to go forward in other sectors using mainly the tools and institutions that we already have. We must adopt as a goal at least the minimum planetary interest, survival—survival of the life support system, of the species, and of persons wherever possible.

“Inviolable national privacy” from official collective scrutiny, and often control, must shrink, and non-governmental appraisal of what states and their leaders, and sometimes even their people, do must continue to be protected against impeding arrangements. Non-governmental scrutiny should, of course, be responsible and balanced. Official relations should, on the whole, not imitate or exploit media attention. Meanwhile, the gap between what is permissibly dealt with in state-to-state relations and the wider area of what the media can properly deal with should narrow, eventually to disappear.

I first heard of Dean Rusk from his Boalt Hall classmate, Justice Frank Newman, when the Justice and I were graduate students together at Columbia. Frank was impressed, and that impressed me. Not having served in World War II in the Pacific and Asian theatres, I only heard of, but did not experience, Dean Rusk's effectiveness in foreign affairs after he came over from the Defense to the State Department as Assistant Secretary for Far Eastern Affairs, because what little I had to do with Japanese occupation policy from the Bureau of Economic Affairs never brought me before him during my civil service days.

After I went to Berkeley myself, I heard a great deal—all very positive—about Professor Rusk, political scientist at a nearby college and linked to the Law School. But he became President of the Rockefeller Foundation before I could meet him on the West Coast. In time, and against my will, I became chief solicitor for external support for international studies at Berkeley, and finally, I was taken upstairs at Rockefeller to talk to the chief.

During the early Kennedy-Johnson years, my very pleasant, very interesting part-time position as the American member of the In-

ter-American Juridical Committee of the Organization of American States did not involve Secretary of State Rusk. But later, as a field ambassador and eventually Assistant Secretary, I entered upon what was for me a period of association with a very great mind and fine person.

More than once after I had hurtled through the "crash door" between Assistant Secretary country on the sixth floor and the inner offices of the Secretary on the seventh, I felt confident that we in the Bureau of Inter-American Affairs had every aspect of a foreign policy line of action worked out, only to have Secretary Rusk raise, always with calm courtesy, a question, factor, or analytical consideration that we had not taken into account. He made me, without hectoring me, feel like a first year law student again. For me it was a positive experience.

There are many memories: of grits served at the Secretary's "request" at working breakfasts with foreign diplomatists (unlike many Texans, I like grits almost as much as Southerners do); of a Sunday when Dean and I alone attended to a nasty and unjustified expulsion of an American ambassador; of magnificent timing of remarks at international conferences; of the touches of humor amidst impressive dignity; of the impact of the sheer quality of the man.

But I did not foresee in those days the Dean Rusk that I now like best to remember: a tall, smiling, beloved teacher, surrounded by his exhilarated and admiring students, he as happy as they in enjoyment of the first moment of victory when it was announced that the University of Georgia Law School team had won the Jesup International Moot Court competition. Now older myself, even so, I felt I knew how the students felt about their great teacher, for in another forum he had been mine!

And now, here today, he will be ours!

