SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 8 | Issue 2 Article 14

1957

Non-Intervention: The Law and Its Important In the Americas by Ann Van Synen Thomas and A. J. Thomas, Jr.

Jaro Mayda

ized relation between Congress and the President. The authors summarize some of the steps that Congress can take to provide the President with a clear statutory policy for his acts, and present the case for a new type of cabinet that will include legislative leaders.

Presidential leadership and the power that goes with it is no longer national leadership but world leadership. Indicative of this is the fact that President Eisenhower is the first President whose claim to his party's nomination has twice rested almost exclusively on his prestige and record in world affairs. Recent events in Hungary and the Suez have resulted in a clear loss of moral leadership on the part of Britain, France and Russia. To the uncommitted nations of Asia and Africa, the United States is the new world leader and President Eisenhower personifies this world primacy. Clearly this is a moment in history when we desperately need a careful examination of the Presidency and its tradition as a great office. In my opinion, the need has been well filled by this book.

HUGH ALAN ROSS*

NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS by ANN VAN WYNEN THOMAS and A. J. THOMAS, JR. Dallas, Southern Methodist University Press, 1956, 416 pages, $8.00.

Intervention is an everpresent feature of international relations. Its rudimentary form is the threat or actual use of military force. Though this form may seem somewhat on the decline, it is still very much with us. The British-French operations in the Suez crisis of 1956 were an example too classical for the mid-20th century; the maneuvering of Soviet land and naval forces amidst the changes in Polish communist leadership was an intervention even though some of these forces were on Polish soil under the Warsaw Pact — the "eastern NATO", the use of Soviet armor to uphold the toppling governments of Gero, Nagy and Kadar in Hungary was an instance as clearcut as it was brutal.

From the more crude military-diplomatic forms, intervention has been shaped over the centuries into ever more effective and refined patterns. Into the field, which in the American mind got its classical image from Marine landings, off-shore cruising of foreign fleets, economic diplomacy and diplomatic intrigue, new possibilities were injected by the great inventions of mass propaganda and trans-national political movements. A perfect, though pathetic, combination of these and the more conventional elements into a monstrous, multiform intervention was the communist success in Czechoslovakia between 1945 and 1948.

*Assistant Professor of Law at Western Reserve University.

To that interventionist feast, the Soviets have added other interesting varieties — probably more than anybody else within the post-war decade — because they were so expansive and blatant. They also "improved" the old standbys, such as economic intervention, by combining the substance of Lenin's dictum that "imperialism is political domination for the purpose of economic exploitation," with forms which, if they did not copy, they certainly surpassed — a United Fruit Company of a quarter-of-century ago (or its British, French and Dutch counterparts) If I add the obvious, that Lenin spoke of the "capitalist powers," it becomes quickly evident that the contemporary fashion of dividing the world into two ideological camps, ill applies to problems of intervention. I shall yet return to this point.

In Latin America, intervention has not always reached the level of complexity and sophistication to which the Soviet teamwork brought it. Also, its imperialist dimension, as far as present, was rather different. Yet, as a whole, interventionist history in Latin America is probably the most notorious in modern times. It has operated largely on the rudimentary plane, and has acquired appropriately rudimentary labels, such as "dollar diplomacy" or "big stick policy." Such an instance, though, as the United States "Blue Book" intended to influence Argentinian elections in 1946, was an interesting, if not successful, specimen of a more up-to-date variety.

To have done away with the "specter" of individual intervention and substituted for it an honored system of collective intervention only, is certainly a major achievement of "American international law," to borrow a label from Judge Alvarez. The genesis of this achievement and the analysis of its background and implications is the main topic of this book on *Non-intervention,* by the Director of the Law Institute of the Americas at the Southern Methodist University Law School, and his wife.

The way the Thomases proceed will delight most readers. They discuss intervention historically; its legality and illegality; the development to non-intervention, that is, collection intervention only; and the various forms of intervention, under traditional as well as new labels ("for democracy," "humanitarian") The discussion is thorough, full of facts and reference, accurate and objective. The authors draw on a very broad background,[1] and even more important, they often synopsize Latin American and other sources, linguistically inaccessible to many readers. The in-

[1] For example, in the discussion of intervention for the protection of property they have an outline of the philosophical conceptions of property, from Aristotle and Acquinas, to Calvinists and Locke, to Code Napoleon and Roscoe Pound.

jection of Latin American jurisprudence is generally a refreshing contribution, whether the source is doctrine or diplomatic practice.[2]

Another welcome feature of the book is its comparative nature. The authors systematically confront the inter-American system with traditional international law and with the letter and practice of the United Nations. Such an approach leads them to many competently written factual and legal summaries of international situations outside the Western Hemisphere, and to frequent interpretations of the United Nations Charter. The latter asides will be especially appreciated by many readers who find Hans Kelsen on the United Nations Charter too heavy.

The authors' attention to legal detail is in line with the main thesis of the book: that "non-intervention and intervention are legal concepts," not "purely political terms," and that they can be defined and analyzed. To understand the full implications of this statement, one must of course think of the frequent emotional approach to problems of intervention in Latin America. The Thomases supplement the main thesis by another postulate: that the law of non-intervention and international law in general must be analyzed in terms of their *value* basis. This is more than a statement of method. With their usual thoroughness, the authors have developed the axiological approach into a running commentary on the nature of law and international law in general. This commentary, together with the specific discussions of international and United Nations law, goes beyond what could be considered a theory of non-intervention. Though integrated in the main study, it is actually an independent inquiry, a book within a book.

As a regional and comparative study of non-intervention, the book is a valuable contribution to the literature on contemporary international law. The method and the collateral topic makes it, indeed, more interesting, challenging and open to debate. The problems opened up by the authors are much in flux and in need of clarification. We are still far from a satisfactory theory of modern international law. And such questions as democratization of the international community are as important as they are still largely inarticulated.

It is difficult to disagree with the authors' reaction to positivism. One does not even have to recall that black blossom of legal positivism, the argument of the British defense counsel at the *Bergen-Belsen* trial in 1945 — that Nazi concentration camps were legal and therefore his ex officio client, charged with the death of many thousand inmates, should be acquitted. It has been recognized by many that law without values is

[2] *E.g.*, the Cuban argument in a United Nations debate on the accrediting of the Chinese communist delegation.

merely an exercise in logic, which leads into a blind alley. The same is true of that law in making, the international legal system. In fact, the inclusion of "general principles recognized by civilized nations" among the sources of law upon which the World Court is supposed to draw, is a clear reinstatement of values in modern international law, in a most authoritative context.

However, the axiological definition of international law and the authors' projection of values in its interpretation and application is based on premises and leads to conclusions which some readers may find difficult to agree with, at least as they stand. The very definition of international law may be a point of preliminary disagreement. If one cares to define law as a system of rules which embody certain principles, usually collected in a basic constitutional document, then "system of jurisprudence consisting of general principles of right, equity and humanitarianism, [etc.]" is not a definition of international law (that is, a system of valid norms), but perhaps of international constitutional law. Moreover, the following particularization of these principles as obligatory on states "in their relations with each other as well as with the citizens and subjects of each" puts this definition in the category of *desiderata* — of what "ought to be," not what "is."

Other points of possible disagreement are often much more subtle. The apparent deviations from what would seem to be a better demonstrable blue-print for an empirical theory of international law are frequently in quantity and emphasis only. To do justice to this fact and the scope of problems which are involved would require a sizable review article. In a brief review I can only outline the main contours of an argument.

The diametrical opposition to positivistic monism, the position that international rules and standards are simply what states agree among themselves, which "emasculated international law by the denial of ethical principles," forces the authors into a somewhat similarly monistic axiological position. That affects their argument in several inter-related ways.

The most striking is the dichotomy of power and law, which on the balance of various statements, seems to be their premise. Elsewhere their concept of power would seem to be limited to unbridled, lawless power. But still other statements, as well as the general context, look to me just enough "off" to indicate that the argument must go deeper than semantics. Perhaps such definitions of functional values as "the end purpose of law is *order and equality*" and "the function of international law [is] to regulate [international politics, economics and ethics] by giving them

form and order,"[3] help to reveal the underlying conception. But should we accept old adages like "law and order" without probing, especially if they cannot stand much criticism? Viewed functionally, the sequence is just the opposite: first *order,* agreement on future norms of conduct; then *law,* the formalization in one form or another, which is of these norms the basis for their enforcement.

Such a conception of "order" as a preliminary and indispensable step to international law does not eliminate values as part of the agreed scheme of conduct, though it also accommodates the disturbing reality of amoral or immoral international treaties, which only feign values; and it does not overlook that order can be unilaterally imposed, for instance in a peace treaty. But it does put power and law in their proper places. It juxtaposes them, rather than make them mutually exclusive. For it is demonstrable that law, national or international, is not only "closely related to politics," but is shaped by it; that the establishment of prior order, on which any but an ideal natural-law system must rest, is a power process; that this process goes through four stages: from the conflict of interests through the alternative of agreement and accommodation or warfare, to order by agreement or through imposition, stabilized informal law and its enforcement; that to be effective, that is enforced, law needs power behind it; and that, in general, the main purpose of international law is not to eliminate power but to introduce into the international community a regulated power process.

Only in such a functional and dualistic, if you wish, frame of reference can we make a place for the process of peaceful change, which is the most important continuing function of international organization, and on which depend both the "maintenance of international peace" and the "revitalization of international law" — in that basic order of interaction, not the opposite.

Though second on my list, the most articulate section in the book is the authors' reaction to the positivist conception of international community. There is, of course, a close relation between this point and "recognition," which is an important item in any discussion of intervention in Latin America.

Against a universal conception of international community, based "sheerly on power," which "undermined drastically the force of international law," the authors postulate a limited international community "based on axiological concepts," *i.e.,* on the acceptance of values built into their definition of international law.

---

[3] THOMAS & THOMAS, NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS 107 (1956).

Whether one prefers such an "exclusive club" conception or not, I think that in all historical fairness we ought to be less sanguine about the worth of the values which really underlay the pre-positivistic international law of such law-abiding exclusive communities as the Westphalian treaties group or the Concert of Vienna. But passing on to the postulated value content, one must conclude, again on balance, that it consists only of such values as "right, justice and humanitarianism" or "order and equality," but not common interest or interdependence. Nor does the authors' definition of international community as a "group of states, seeking greater interdependence through international law"[4] admit the assumption that they consistently consider common interest or interdependence as *prerequisites* of an international community.[5] Put as it is, their interdependence must be considered an *ultimate value* to be realized.[6]

Perhaps in this case the misunderstanding is partly semantic. There are values with which an order must start; and values which an ordered community seeks to realize. The two groups of values are not necessarily different in kind. Rather, the ultimate goal is likely to be at least the materialization of the minimum values agreed upon, or, under more favorable circumstances, their quantitative growth and improved implementation. In any case, if the values of "right, justice and humanitarianism" are separated from or posited against such values as interdependence or common interest, the resulting conception of international community has some defects.

First, it is based exclusively on the historical Atlantic version of international law, which Professor Northrop and others have rightly warned can never be expected to command a complete adherence of the emerging Asian-African world. Secondly, it freezes the bi-polarization of the world. This may be a convenient tool for simplified political analysis, but it has all the disadvantages of convenient simplifications. It is static. It takes the Soviet communist dogma at its pseudo-scientific face value, although we know that communist strategy and tactics are flexible, because the dogma can be pursued at home and abroad only so far as Soviet and captive peoples and other states allow it. It limits the danger in the world to Soviet aggression, the most acute international form of totalitarianism.[7]

---

[4] THOMAS & THOMAS, *op. cit. supra* note 3, at 100.

[5] *Cf.* THOMAS & THOMAS, *op. cit. supra* note 3, at 267 There the authors set forth an approving quotation.

[6] Incidentially, the juxtaposition of the non-legal concept of interdependence (political, economic, social and defensive) and of international law is again reversed here, as it corresponds to the authors' conception of power and law.

[7] *Cf.* THOMAS & THOMAS, *op. cit. supra* note 3, at 285. This must be so read in the whole context.

Thus it overlooks other dynamic, if not explosive, forces which endanger the balance in the world and which Soviet communism merely tries to ride to its advantage. A few years ago Walter Lippman coined a fitting phrase about "continental convulsion [in China and South East Asia] of which communism is only an ingredient." The contemporary events in northern Africa and the Middle East are another good example.

Thirdly, the envisaged community consists of democratic states only. No one can seriously dispute that the system of democracy is the best yet devised, because it best protects and develops individuals which ought to be the alpha and omega of any polity. But I wonder about the merit of a display of the best values of the Atlantic world for others to take or to reject. For one, even tested democracies can be quite autocratic in their international dealings and spotty in their domestic affairs. The desirable ideal values do not exist as absolutes in human relations. Moreover, democracy comes in "57 varieties." One may be rightly annoyed at Prime Minister Nehru at times, and one is. But it reads oddly to see India labeled as a nation which is "still non-totalitarian." A self-righteous and exclusive stand could only blind us to the constant need of improving our own "club," and make us unable to meet the ever new power crises so as to prevent the breakdown of the minimum standards of workable international law and organization to which we care to adhere.

The values, with which the authors work, add up to a limited political conception of democracy. This too is open to criticism. Political rights without economic means are unreal, or even unattainable. In national politics this is an axiom. In the international community, there is no way to cultivate such political virtues as "justice" or "humanitarianism," unless we also take care of economics and trade. The authors' de-emphasis of economics would seem inconsistent with the otherwise stringent criteria of home government, which they favor as basis for recognition and membership in the limited community. Such a position is also inconsistent with the "intersocial" international law which they correctly postulate. Curiously enough, they de-emphasize economics also in their discussion of non-intervention, though they discuss such economic interventions as Nicaragua, which illustrated well that Lenin's dictum works also the other way: economics can make the way for political domination.

Perhaps the ultimate argument against the limited community, contrary to the basic principle of the United Nations, has to do with the concept of democracy in international relations. The authors say flatly that "it is impossible to arrive at the conclusion that the United Nations was established to secure world-wide democracy," for "the organization is based on 'sovereign equality,'" which "would indicate [it does, indeed] that the organization cannot legally favor one form of government over

another," and "the democratic form of government was not included among the requirements for admission of a new member."[8] But does not the process of securing democracy include also application of those principles to which the United Nations is devoted both in letter and in practice: humanitarian standards, majority rule and peaceful adjustment of the legal system to changes in power distribution in the community? Why not talk rather about introduction of democratic methods and principles into international procedure? This is a more realistic goal. For even states which domestically do not classify as democracies, may and do submit to international majority decisions. And the general improvement in the world picture, and the reduction of tensions, which does not seem feasible without a universal community organization, is the most likely source of the atmosphere in which authoritarian regimes begin to pay attention to the desires of their own peoples and thus open the gate to domestic liberalization and international mellowing.

I could not do better than to sample and to outline. And I am sure I did not use enough conditional propositions to present the thesis and antithesis in all subtlety. However, I do hope that the reader will find this review as provocative of thought as I found the book. It is a real contribution, which does not satisfy itself with an exhaustive but noncommittal technical discussion. Such a commendation is more than one can give to long shelves of past and current scholarly production in the field.

JARO MAYDA*

WE THE JUDGES by WILLIAM O. DOUGLAS. New York, Doubleday & Company, Inc., 1956, 480 pages, $6.00.

The material for this book was originally delivered as the Tagore Lectures at the University of Calcutta in July 1955. One suspects that the spoken lectures made better listening than do the written pages make good reading.

Justice Douglas' purposes are indicated by the book's subtitle: "Studies in American and Indian Constitutional Law from Marshall to Mukherjea." He divides his book into twelve chapters dealing with the dual system of courts; legislative prerogatives; the administrative agency; the commerce clause; due process; free speech, press and religion; the right to a fair trial; equal protection of the law; and the judiciary. His method is first to state the provision of the United States Constitution he is inter-

[8] THOMAS & THOMAS, *op. cit. supra* note 3, at 370.

* Formerly Assistant Professor of Law, University of Wisconsin Law School.