

1969

Communications Comment

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Recommended Citation

Charles Burton Marshall, *Communications Comment*, 3 INT'L L. 435 (1969)
<https://scholar.smu.edu/til/vol3/iss2/18>

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Communications

(Editor's Note: In an article entitled "Rhodesia and the United Nations: The Lawfulness of International Concern", 62 American Journal of International Law" (1968), Professors Myres S. McDougal and W. Michael Reisman approved United Nations' sanctions against Rhodesia. Part of the article was reprinted in 2 International Lawyer (July, 1968). In that same issue were published remarks by Dean Acheson, sharply critical of the position taken by Professors McDougal and Reisman. Given hereunder are supplementary remarks by Professor Charles Burton Marshall, further criticising the McDougal-Reisman position, and a reply by Messrs. McDougal and Reisman to Professor Marshall.)

Comment—Marshall

One shred of the debris left by Mr. Acheson's mighty blast deserves attention.

According to one of the arguments raised by Myres S. McDougal and W. Michael Reisman in attempting to rationalize sanctions against Rhodesia, that country's policies "constitute . . . at least the creation of circumstances under which states have been customarily regarded as justified in unilaterally resorting to the coercive strategies of humanitarian intervention" (62 A.J.I.L. 1, 10-11). The assertion is not syllogistically developed. A reader is left to guess what the content of the policies referred to may be. A footnote is vouchsafed concerning the canons ostensibly invoked. It reads: "6 Moore, International Law Digest 345-367 (1906); Lauterpacht, International Law and Human Rights 120 ff. (1950); Murty, Propaganda and World Public Order: The Legal Regulation of the Ideological Instrument of Coercion 83, footnote 16 (1968)."

Skeptical of the argument but curious to see whether my own contrary recollections concerning international law might be at fault, I have taken pains to check the authorities cited. Here is what I found.

The relevant pages in John Bassett Moore's *Digest* reproduce some twenty items of official U.S. correspondence and pronouncements in the period 1840-1902 related to questions concerning persecutions of Jews abroad. These items characteristically reflect reluctance to intercede on behalf of others than U.S. citizens. A typical expression is that of President Buchanan in 1859:

I have long been convinced that it is neither the right nor the duty of this government to exercise a moral censorship over the conduct of other independent governments and to rebuke them for acts which we may deem arbitrary and unjust towards their own citizens or subjects. Such a practice would tend to embroil us with all nations. We ourselves would not permit any foreign power thus to interfere with our domestic concerns and enter protests against the legislation or the action of our government towards our own citizens. If such an attempt were made we should promptly advise such a government in return to confine themselves to their own affairs and not intermeddle with our concerns.

The pertinent pages from Hersh Lauterpacht's *International Law and Human Rights* contain several philosophic expressions of the author's aspiring outlook. I cite one for illustration: "The law of nations, and, we may say, the law of nature, by denying, as their needs must do, the absolute sovereignty of States, give their imprimatur to the indestructible sovereignty of man." More to the point, however, is Lauterpacht's appraisal of the law as it is rather than as it might be: "Although international law does not at present recognize, apart from treaty, any fundamental rights of the individual protected by international society as against the State of which he is a national, it does acknowledge some of the principal fundamental rights of the individual in one particular sphere, namely, in respect of aliens."

The relevant footnote in B.S. Murty's book contains four references. I have read them. These are discussed in turn below.

The first Murty reference is to pages 312-313 of the 8th edition of Hall's *International Law*. The pages cited discuss piracy and therefore are not at all germane. (At another place, however, Hall's *International Law* calls it "... settled that as a general rule a state must be allowed to work out its internal changes in its own fashion.")

Murty's second reference is to page 312 of L. Oppenheim's *International Law*, 8th edition, edited by Lauterpacht. Besides observing that a state can treat its own nationals according to its own discretion, the relevant page also refers to "a substantial body of

opinion” to the effect that there are limits to that discretion and that intervention is legally permissible when a state renders itself guilty of cruelties. An editor’s footnote says, “. . . possibly, to the extent to which ‘human rights and fundamental freedoms’ have become a persistent feature, partaking of the character of legal obligations of the Charter . . . they may have ceased to be a matter which is essentially within the domestic jurisdiction of states.”

Murty’s third reference is to page 242 of Fenwick’s *International Law*, 3rd edition. The page concerned refers to instances of interpositions against massacres and notes efforts by jurists to develop technical grounds to justify such interventions in view of the element of interference in the domestic affairs of the misbehaving states.

Murty’s fourth reference is to page 310 of Brierly’s *Law of Nations*, 5th edition. There Brierly says “. . . it involves a radical departure from the present basis of international law to maintain that a state’s treatment of its own subjects is, in the absence of any treaty protection, anything but a domestic matter which it may decide at its own discretion.”

In sum, none of the sources directly or indirectly cited by McDougal and Reisman vindicates the allegation in support of which it is invoked. To the contrary, most of the cited sources unequivocally contravene the allegation. The moral to be drawn is clear. Even on behalf of a cause deemed righteous, scholars should practice rigor.