

UNILATERALISM: THE DIRECT CHALLENGE TO INTERNATIONAL LAW

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In today's interdependent world, unilateral actions by nations often place additional strains on an already creaking international system. Unilateral actions contribute to the current low estate of, and constitute a direct challenge to, international law. By unilateralism I mean any effort by one nation to use its domestic laws and policies to influence the law of nations. It is a negation of bilateral and multilateral mechanisms for reaching international consensus or agreement.

Unilateral actions to protect national security or other vital national interests have been excluded for obvious reasons. Moreover, it is conceded that a precise delineation of what constitutes a domestic as opposed to an international concern is not always possible. The examples I have chosen to illustrate unilateralism in the United States are neither exhaustive nor intended to suggest that unilateralism is solely an American phenomenon. I am not a scholar, and I cannot say whether the tendency towards unilateralism is greater today than in the past. But as many people have observed in the recent past, unilateralism certainly seems to have increased in Washington, D.C. This is related, in part, to the high moral tone adopted by the Carter administration and, to a lesser extent, by previous administrations.

There seems to be a belief among people, particularly among well-intentioned Americans who believe they enjoy a morally superior vision, that the interests of other people are unimportant or do not exist at all. The strength and weakness of our nation in the international arena appears to be related to how well we control our noble impulses in order to move an imperfect world forward.

One thing is clear. The world is becoming increasingly interdependent as a result of the advances in science and technology and the economic, military, and political forces they create and sustain. If there is a greater threat to world peace today, there are also op-

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portunities for improving the oppressive conditions of disease, poverty, and ignorance that afflict much of mankind. Many challenges today — for example, environmental pollution, nuclear energy, regulation of transnational business, and arms control — are global in nature. They can only be resolved internationally by agreement among nations. Interdependence is a fact of life. It requires a change in attitudes and institutions at home and abroad in order to reach lasting solutions to international problems. Some issues are, of course, more sensitive and difficult to address than others, but regardless of the issue, the methodology of interdependence is bilateralism or multilateralism, and not unilateralism.

It is unfortunate that the complexity of issues and the congestion of interest groups involved make it extremely difficult — if not impossible — to resolve certain issues. Take, for example, the New International Economic Order. It has involved 159 nations, hundreds of multinational corporations (some larger than many countries in terms of sales versus national budgets and number of employees versus population), labor unions, and dozens of non-profit multinational foundations. According to one report, in a recent year these diverse groups met in 700 intergovernmental conferences and more than 3,000 international association meetings.

There is no lack of international organizations interested in initiating multilateral discussions on any reasonable — and some unreasonable — topics. Intergovernmental organizations have been established at the drop of a hat and have grown like Topsy since World War II. Business and voluntary associations cross international boundaries and provide additional avenues for discussion and negotiation. Hence, the problem is not a lack of forums. It appears to be just the opposite — an international bureaucratic web where the complexity of issues, the dispersion of power, and competing interest groups entangle every proposal.

Wherever we look, the international political-legal system is under strain. Whatever the issue, there is considerable evidence to indicate that the process is becoming more complicated, time consuming, and frustrating. There are a variety of reasons underlying the lethargy in the international process: the complexity of the issues, the number of interest groups, political pressures, ideological conflicts, lack of sophistication among nations, and all the other human shortcomings afflicting both nations and individuals and combining to make multilateral solutions increasingly difficult to achieve.

Recent unilateral activities in our domestic political process, which either have or will have significant consequences — both political and legal — for the international system, add to the burden and stress. The specific areas which I have observed, although there are certainly others, include proposals for regulations to control hazardous products; congressional and executive attempts to impose restraints on public international financial institutions (such as the World Bank and the Inter-American Development Bank); conventional arms limitation policy; the proposed United States Criminal Code; environmental actions; and human rights policies.

Each unilateral effort has several features in common: (1) the position adopted assumes a very high moral purpose; (2) it is taken by the United States either without a realistic assessment or consideration of the international impact or, after consideration, the international impact is discounted in the political process; (3) it will affect international law and policy; (4) it is likely to create conflict and be self-defeating; and (5) it fails to assess the needs and aspirations of other nations and the obvious limits of United States influence abroad.

I am not concerned as much with the ends of United States policies which are determined through our democratic political process as I am with the means employed to implement such policies. In creating policy, there is a constant challenge to avoid the illusions and fantasies often encountered by policymakers at high levels of sonorous abstraction. The sirens to be avoided are often their own voices and the voices of those who think as they do. Odysseus, a very able, wily, and practical man, recognized human limitations. His successes may be attributed to his ability to separate fact from fancy, as well as to sporadic divine assistance. There appears to be a greater need to understand the real world — the changed realities of American power and prestige, the developing facts, attitudes, purposes, and capabilities of other actors on the scene. In short, we should operate fully awakened to the world in which we live. Modern man has found this increasingly difficult to do as he spends more of his time dealing with abstractions than recognizing his own limitations.

Hazardous Products

To illustrate the point that unilateralism often springs inadvertently from domestic policy, let us consider a recent initiative by the Office of the Consumer Advisor in the White House. In late 1978,

this Office prepared a comprehensive policy to eliminate inconsistencies and ambiguities in the export of hazardous products. Such a policy had been long overdue. Before drafting the policy, however, no analysis was made of the export and import laws relating to hazardous products in the other major exporting and importing countries. Moreover, no attempt was made to discover what, in fact, the practices of private industry were under the current laws. Without such information, it is impossible to develop or implement an intelligent policy.

The reasons for this are obvious to anyone familiar with international trade and investment. If the policy is too onerous, United States exporters — the bulk of which are multinational corporations with plants in other countries — will shift their production. The likely effects would be to reduce United States exports and increase foreign sales, to reduce investment in the United States by both domestic and foreign corporations, and to stimulate further erosion of the once dominant position held by the United States in industrial chemicals. Both domestic and foreign-owned companies have been appalled by the absence of consultation by the White House. When this matter was brought to the attention of the Special Representative for Trade Negotiations, he stated that there are many non-tariff trade barrier issues to be resolved in seeking international harmonization of environmental and health regulations. Apparently, there was no consultation among government agencies on this issue.

International Financial Institutions

Another example of how our domestic political process intrudes on the formulation of international public policy is the attempt by the legislative branch to place political restrictions on international financial development banks. Our obligations under the charters of these banks, which we helped to establish, restrict the imposition of political restraints on loans. Yet political activists from the left and right have succeeded in introducing amendments that would bar loans to South Africa, Vietnam, Chile, and Cambodia. To date, these efforts have had no effect on these international banks. They are, however, representative of the kind of unilateralism that undermines United States credibility in the international field and diminishes our ability to lead the way in the development of international law. Furthermore, according to one congressional study commissioned by the late Senator Humphrey, they diminish

our ability to influence the policy of these banks on matters of import when United States influence could be beneficial.

Conventional Weapons Policy

One of President Carter's first initiatives was a new unilateral policy designed to limit the sale of conventional arms abroad by all nations. An assumption was made that the United States could only develop a credible leadership position if it acted unilaterally. After having established its good intentions by selfless example, it was thought, the United States would bring about international cooperation. On its face, it is a logical and certainly well-intentioned position. But the United States is the world's largest arms merchant, and its motives are bound to be scrutinized by friend and foe. It should at least show good faith before expecting others to follow.

It seems to be the hope of enlightened people to ban the implements of war — to make war as obsolete in this century as dueling, and armed force as unnecessary as a sword has become to individual citizens. In its own mysterious way, the good which we may desire does not necessarily flow from unilateral efforts. It is as if an invisible hand thwarts our best intentions. Critics, relying on facts rather than desires, have pointed out that since President Carter set his ceiling on United States arms sales (which does not apply to sales to NATO countries, New Zealand, Australia, or Japan), such sales have actually grown from \$11.4 billion in fiscal 1977 to \$13.8 billion in fiscal 1978.

There has been no interest shown by other vendors to limit their own arms sales; instead, specific reductions in United States supply of certain weapons have been met by increases in foreign supply. Confounding the desire of nations to limit the sales of weapons are the hard facts of self-interest. Nations sell arms to earn foreign exchange, to help allies maintain internal security, to maintain a regional deterrence system such as NATO, to preserve a precarious peace such as in the Middle East, where we supply both Egypt and Israel as well as Saudi Arabia and other potential protagonists, and to spread out research and development costs.

Former Senator Clark, an arms control expert, used to become annoyed by the argument that if the United States does not sell, someone else will. It certainly is not a noble argument, but it seems to enjoy one distinct advantage over other arguments advanced — it appears to be true. Senator Clark compared this argument to a

fellow he knew who used to cheat at cards; this fellow reasoned that if he did not cheat, someone else would get the money. The logic of this analogy escapes me and evidently escaped voters in Iowa who retired Senator Clark after one term.

Recently, in view of the lack of imitation by other nations, the President decided to link any future United States cutbacks to acts of cooperation from other arms-selling nations. In analyzing the President's former policy, it seems to combine all the features of unilateralism. It was done with the highest moral purpose; it failed to assess realistically the international impact; it would have had an obvious effect on international policy; it created conflicts and was self-defeating; and it certainly failed to take into consideration either the needs of other nations or our own limitations on influencing their behavior.

Criminal Code

The proposed codification of United States criminal law introduces a new category of "extraterritorial" jurisdiction of the United States that will certainly serve as a beacon for debate by international lawyers and others attracted by its controversial glow. Last year the Senate passed a Criminal Code Bill (S. 1437), and the House Judiciary Committee has issued a report on its version of the Bill. Congress has returned to this legislation in its current session.

The proposed Code illustrates how domestic laws also can be employed to bring United States law into conformity with standard international practice. Section 204(b) of S. 1437 provides a comprehensive penal code applicable to federal employees and members of their households living abroad. Currently, the United States is one of the few countries that does not extend its criminal jurisdiction on a personal basis to its official representatives living overseas. This has resulted in an anomalous situation where federal employees abroad may be completely immune from prosecution for acts which are criminal in a foreign jurisdiction and would be criminal at home. This occurs, for example, when there is a gap in current United States criminal jurisdiction and where federal employees abroad enjoy diplomatic immunity that exempts them from foreign criminal jurisdiction. Moreover, the Supreme Court has struck down as unconstitutional the court-martial jurisdiction over civilians serving with, or accompanying, United States armed forces overseas and over former service members for offenses committed while they were subject to military law. Section 204(b)

should remedy these gaps in United States law and bring it into conformity with international practice.

The controversial aspect of the proposed Criminal Code concerns the extraterritorial jurisdiction of United States law and the conflicts that are likely to arise with the laws, citizens, and authorities of other nations that do not share our legal and ethical traditions. Section 204 defines the extraterritorial jurisdiction of the United States in such a way that many experts see a direct conflict developing between United States and foreign law over jurisdiction of crimes committed by foreigners in their own countries. As a practical matter, it will be nearly impossible for our government to obtain jurisdiction over the foreign national. Yet, it is unquestionable that, like our anti-trust laws, it will lead to unnecessary conflicts between governments. To other nations that do not share our values or legal norms this might appear as an example of an imperial attitude.

Environment

The National Environmental Policy Act of 1969 (NEPA) requires federal agencies to prepare an environmental impact statement (EIS) for every major federal action that significantly affects the quality of the human environment. Environmentalists claim the term "human environment" is not limited to the artificial boundaries of nation-states and that the Export-Import Bank should, for example, prepare an EIS when it plans to finance the sale of dredges to Indonesia, engineering services to Gabon, or power generating equipment to Trinidad and Tobago, all of which clearly have no effect on the United States environment.

The Council on Environmental Quality staked out the most extreme environmental position on this issue in January 1978. After strong opposition from other federal agencies, including the Departments of State, Commerce, and Defense and the Export-Import Bank, the President issued an Executive Order which restricts the reach of NEPA to actions affecting the United States and the global commons (a term used to describe geographic areas not falling under the jurisdiction of any nation). Federal actions affecting the environment in other nations require only that the federal agency prepare an assessment of the likely environmental consequences.

Already there have been conflicts with both Canada and Mexico over pipeline projects. It is arguable that in both instances the United States must prepare a full-blown EIS because, due to their

proximity, the pipelines would have a direct effect on the United States environment. Neither the Canadians nor the Mexicans are particularly pleased with the presumption that the United States knows what is best for them. Here again no attempt was ever made, in drafting NEPA or in CEQ's interpretation of it, to determine the reaction of other nations. Many developing countries believe the most industrialized nation in the world is not acting responsibly when it unilaterally exports its standards without due consideration of the needs and aspirations of developing countries.

Human Rights

Everyone favors the pursuit of human rights as the expression of fundamental American ideals. There is, however, considerable confusion and perhaps an irreconcilable divergence over the definition of that term and its use between the democratic West and the totalitarian East. What has become apparent to many observers is that there has been a unilateral, heavy-handed, and often counter-productive employment of the United States human rights policy as well as a balanced and fruitful use of that policy.

To the extent the United States substitutes public threats and intimidation for quiet and deliberate diplomacy, its actions are interpreted as being those of the willful bully, however well-intentioned. Assistant Secretary of State Patricia Derian has been reported as stating that the flag behind her desk was under her foot when she was a civil rights activist. It is perhaps this kind of zeal that may not be understood or appreciated by other nations with different cultural and political traditions.

The net effect of extremism and unilateralism in our human rights policy has been a predictable response by other nations. Chileans, Brazilians, and Argentinians refuse to be swayed by threats of economic and political sanctions. They point to United States policy towards Cuba, China, and other well-known violators of human rights to underscore the unevenness of the application of ideals in a complex world. A loss of exports by United States firms appears to be the only measurable effect of the unilateral and erratic application of United States human rights policy.

Now, I am not advocating bilateral or multilateral efforts as the best approach to all situations. It is arguable that much that is done multilaterally is as silly as the actions nations take unilaterally. Malcolm Muggeridge tells the story of a treaty that was developed by the International Labor Organization (ILO) for the League

of Nations. This treaty dealt with women working in coal mines. An ILO employee had spent eight years of his life working on this treaty and was ecstatic when finally the treaty was signed, with only two states — India and Poland — expressing reservations. Later Muggeridge learned that only India and Poland permitted women to work in coal mines.

Nor am I suggesting or recommending that the practicalities and realities of international life, whatever they may be, should be the only standards for determining international policy and law. It is important to have and pursue ideals even if they are unattainable. An ethical system, such as our own Western system based on Judeo-Christian traditions and beliefs, is fundamental to any legal system. The absence of such values contributes to the tragedy of a Jonestown.

Moreover, I do not believe that lawyers in general and international lawyers in particular are the fountains of all wisdom for deciding policy issues. At times, the legal community has permitted its fascination with the rule of law to overcome its better judgment about the way the world works. Dean Acheson, in several speeches to the International Law Section of the ABA, admitted that he liked to “stir up the animals” by commenting on the “arrogance that international law seems to instill in its addicts.” He went on to say, “to be sure, law in general instills this in lawyers in general. One can be tolerantly amused at the veneration which craftsmen in any craft have for the materials of their craft. The cobbler murmurs that there is nothing like leather, but he is too modest to envision as man’s highest earthly condition the Rule of Leather. Yet the lawyer does not hesitate to proclaim it to be the Rule of Law. As he describes it, the Rule of Law seems to be governance by disembodied principles without intervention of human hand or voice.”

If there is a growing awareness in the world of the interdependence of peoples, problems, and policies, there is also a very articulate segment of Americans — some in high positions — who seem to be pursuing a moral vision that will not assist in fashioning new cooperative attitudes and institutions in a world of sovereign nations or in solving the real problems that need to be addressed. The new morality rivals the religious zeal of the Nineteenth Century American Christian Missionaries. The new secular religion has its own trinitarian beliefs centered around the environment, human rights, and the goodness of government. What appears to be lack-

ing is moderation and good sense, intellectual integrity and high standards.

Whether other nations wish us well or ill, and whether we like it or not, the United States remains the most important stabilizing factor in world politics and international law. Our record is certainly not unblemished, but compared with other nations we can take justifiable pride in our accomplishments. Neither economic nor military power offer a sufficient explanation for the influence we still have. I think that as the world's largest, oldest, and certainly liveliest democracy, our capacity for shaping the world we live in has been enhanced by our concern for the Rule of Law, which we inherited from the English.

If we are to maintain the ability to move the world towards a stable and prosperous world order, we must reach back to the sources of our strength — moderation in our actions, the pursuit of excellence, and the adherence to the procedural due process that is the foundation of our legal system.

Thank you very much.