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Legal Order in a Violent World, by Richard A. Falk

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LEGAL ORDER IN A VIOLENT WORLD. By Richard A. Falk. Princeton, N.J.: Princeton University Press. 1968. Pp. xvi, 610. \$15.00.

Professor Falk is one of the most erudite and sophisticated contemporary American writers on International Law. Although well versed in the technicalities of lawyers' International Law, his concerns are with the role law does and should play in the international system. His orientation is both towards jurisprudence and policy. He has been strongly influenced by Myres McDougal and the Yale school of international law which in turn depends in its methodology and outlook on Harold Lasswell's political science. Falk "shares with McDougal the conviction that law is in effect a branch of social engineering and that the role of the lawyer is to develop a systematic use of legal techniques for the promotion of human welfare."¹ But Falk differs with McDougal in some of his normative assumptions and, therefore, arrives at quite different results.

The present volume is a collection in revised form of fifteen essays, all except two of which had been published before, though some only for limited circulation or in little known periodicals. The author points out that as his views have changed during the period of seven years and have become, in particular, more critical of American foreign policy, the result is "some unevenness of outlook."² This seemed to have disturbed at least one reviewer, who suggested that the book should have "collected essays" as its subtitle and "that the reader should be prepared to peruse the contents selectively rather than *seriatim*."³ To this reviewer, however, it seems that considerable unity of basic philosophy and theme holds the volume together and gives it distinction.

Professor Falk's basic concern is with the apparently declining relevance of international law in a world of increasing potential and actual violence, in spite of the promise of the United Nations. The Charter of the United Nations does not offer clear and effective guidance regarding the two chief dangers to world peace: the nuclear arms race, and large scale civil wars which generate the participation of third states. Limits on using nuclear weapons today "derive more from prudence and in-

1. Higgins, *Policy and Impartiality: The Uneasy Relationship in International Law*, 23 INTERNATIONAL ORGANIZATION 920 (1969). Miss Higgins in an excellent review of Falk's whole *oeuvre* discusses in some detail the ramifications of the "New Haven School of international law" and particularly the increasing disagreements between Professors McDougal and Falk.

2. R. FALK, LEGAL ORDER IN A VIOLENT WORLD xiii (1968) [hereinafter cited as FALK].

3. 63 AM. POL. SCI. REV. 249 (1969).

hibition" than from legal norms contained in the Charter. In the case of intervention into civil strife, international law has not become the instrument of a centralized authority but an aspect of international communication of various kinds, some diplomatic and conciliatory, others merely propagandistic. As he emphasizes in his Introduction, the intentions of his investigations are both normative and analytical.⁴

Throughout this volume of studies two normative premises are explicit. The first is the deeply pessimistic belief that a radical change of the present security structure in the world could only be expected after the unprecedented trauma of World War III which might finally remove the control of military security from the sovereign nation states to a supranational agency. It is hard to escape the impression that this premise has definitely a utopian dimension, reminding one of chiliastic images which envisage beyond the apocalyptic catastrophe the emergence of the rosy dawn of a new golden age. Yet, there remains in Falk a glimmer of hope that somehow, perhaps, the whole trauma can be avoided, particularly if its inevitability is impressed with due strength on the educatable elite. So in the last chapter of the book, Professor Falk speculates about the modes of radical disarmament in our present world and the development of alternative forms of security.⁵

The author's second normative premise is his insistence that a need for a more centralized international system has been created by the development of the rapidly evolving post-colonial "Third World" which produces recurring violence within individual political units leading to intervention by the Great Powers. Falk desires the development of an international order which will accommodate the aspirations and expectations of the poor states for more equitable distribution of wealth, welfare and human dignity. He believes that a slowly growing consensus towards world community, hand in hand with further progress towards regional associations, points in the direction of a more vertically structured, more centralized international system.⁶

In Part I of the book, Falk develops his basic jurisprudential orientation. He leans in his method strongly on Lasswellian social theory. Some of the language and thought taken from political science, communication theory and psychology may sound strange to the professional lawyer. Falk's attention is always engaged in a parallel manner towards both the structure of international society and the behavior of the actors within that structure: he wants to improve the effectiveness of inter-

4. FALK viii-ix.

5. *Id.* x.

6. *Id.* x-xi.

national law by changing this structure, but at the same time he wants the policy maker to display more "law-oriented behavior" while working within the existing structure. Evidently, he believes that a great deal can be done within the existing international structure and even without greatly expanding the role of international institutions.⁷

Falk agrees with McDougal that international society today is essentially decentralized. "There is no existing universal moral order." Individual states "will use every means at their disposal to maximize their values." Where he differs from McDougal is, first of all, in his unwillingness to envisage the World as essentially divided between two blocs. He increasingly stresses the significance of the "Third World." Secondly, Falk is doubtful of, or even repelled by, McDougal's "cold warrior" stance which unquestioningly accepts the superiority of Western to Communist values.

In concrete cases, Falk fears, a one-sided value orientation will suggest an unjustifiable asymmetry between the United States and the Soviet Union, *e.g.* in 1962 one would have had to contend that American missiles in Turkey were permissible whereas Soviet missiles in Cuba were illegal. (In this example Falk ignores the fact that Soviet missiles in Cuba changed in the view of the United States the military balance of power, a consideration which for conceptual reasons would be difficult to express in legal terms.) For determining such controversies Falk looks to impartial judges: to the non-aligned countries, and to the United Nations General Assembly. But why does he, as it seems, believe that these non-aligned neutrals are impartial? Practice has certainly shown that the non-aligned countries are seldom united on norms, and even less in their more mundane interests. Therefore, one can hardly expect an impartial and cool-headed judgment from their representatives inside or outside the General Assembly, and particularly not in days of real tension, such as the Cuban missile crisis.⁸

Falk, like so many other writers before him, feels that the effectiveness of international law is seriously undermined by its being mainly used as a handmaiden for the advocacy of one's own policy position which is frequently motivated by an unenlightened and shortsighted interpretation of the national interest. The theorist of international legal systems, no matter how realistically aware that law will inevitably be made to bend to fit policy, cannot, so Falk insists, forget about the "stabilizing benefits of a rule-oriented approach" to international law. But this, as Falk agrees with Roger Fisher, means that in the absence of sufficient institutional

7. *Id.* 5-6.

8. FALK 89, 270 n.19.

restraints, the effectiveness of legal norms will depend on the "comparative autonomy of rules symmetrically perceived and applied."⁹ In effect, Falk is trying to persuade the United States that a more openhearted orientation towards international law, no matter what others should do, would be more in the enlightened interest of America than its present policy.

Civil strife and intervention is the theme of Part II, the most varied and probably the most instructive part of the book. These fascinating essays range from theory to narrative and analysis of certain phases, or of single instances, of intervention. Two chapters deal with American involvement in Vietnam which Falk regards as legally unjustifiable. The first is a devastating criticism of the Memorandum of the State Department's Legal Adviser (printed in the Appendix); the second is a rebuttal to Professor John Norton Moore's sharply different point of view.¹⁰ Professor Falk's thinking on Vietnam continues in a most interesting monograph, "Six Legal Dimensions of the United States Involvement in the Vietnam War,"¹¹ wherein he summarizes his position that

there has been a persistent failure by the United States throughout the Vietnam War to adhere to the specific rules of international law governing recourse to and conduct of war. This failure also characterizes the behavior of other principal sovereign states. Therefore, the criticism directed against the decision-process that operates in the United States Government is applicable to other states within international society, although the power of the United States and the severity of its apparent violations of international law make the focus on the American situation logical at this point.¹²

One turns with some eagerness to the conclusions of this monograph in order to find Professor Falk's final verdict on American foreign policy. Characteristically, he switches easily from international law to policy prescription. He rejects neo-Wilsonism which he finds exemplified particularly in Dean Rusk and W. W. Rostow, and which "suggests that the United States has a unilateral responsibility and prerogative to establish ideologically self-serving global rules of order as part of its

9. *Id.* 89.

10. All three articles appeared originally in 75 *YALE L.J.* 1122-60 (1966), and 76 *YALE L.J.* 1051-1158 (1967) and were reprinted in the American Society of International Law's admirable collection. R. FALK (ed.), 1 *THE VIETNAM WAR AND INTERNATIONAL LAW* 362-508 (1968).

11. *Id.* vol. 2, at 216-259 (1969).

12. *Id.* at 217.

mission to bring into being a peaceful world."¹³ He finds neo-Kennanism sponsored by Senator Fulbright and, of course by George Kennan himself, equally inadequate. He does not believe that the "quality of international society at present" warrants the partial withdrawal from participation in world affairs which neo-Kennanism advocates.¹⁴

Falk himself desires an active American foreign policy on a "new normative foundation for the assertion of influence and military power throughout the world" which would replace the present ideological and geopolitical policy of containment of Communism. The new foundation should

embody a world-order orientation—one that is sensitive to regional and world-community procedures for authorizing collective measures and that defines permissible recourse to international force by reference to treaty standards of prohibition directed at intervention in internal affairs and at nondefensive recourses to military action.¹⁵

He believes that such a normative foundation would generate policies which could deal more effectively with the considerable revolutionary violence he anticipates throughout Asia and Africa. The United States should cease to play a "counterrevolutionary role" (he adds that the Soviet Union's role in Eastern Europe is also "counterrevolutionary") in world society and should only take action when "the host government appeals through an international institution for external military support and that appeal is endorsed by that institution."¹⁶ He is realistic enough to see that not even this approach will safeguard populations from "terroristic oppression" but it seems to him clearly preferable "to risk the uncertainties of supranational consensus than to rest world order upon the claim of special prerogatives by the United States or any other sovereign state."¹⁷

What will be the role of international law in this new world order pioneered by the United States? To this Professor Falk gives a clearly formulated answer which rests squarely on his evolving jurisprudential position:

A central function of law is to help structure the expectations of national governments and their populations. This is a time

13. *Id.* at 257.

14. *Id.*

15. *Id.* at 258.

16. *Id.*

17. *Id.* at 259.

when it is important to try to restructure expectations about what is permissible and impermissible in the context of a category of conflict of which the Vietnam War is the most prominent instance to date. Such a restructuring of legal expectations demands not only the assessment of the legal standards governing national behavior, but—even more importantly—a sense of how the procedures of national governments and international institutions may bring these standards to bear more effectively both throughout such a conflict and at pre-violent stages of conflict.¹⁸

Although Professor Falk is realistic enough to emphasize that the “domestic system” of the United States has been unable to sustain the kind of foreign policy which is exemplified by the involvement in Vietnam, it is doubtful to this reviewer that the “domestic system” of the United States is better equipped to sustain a policy vastly more complicated and even harder to explain than the supposedly outdated and usually misunderstood, misapplied and mishandled policy of containment. Even on the highest level of scholarly speculation, it is by no means clear what exactly the “expectations of national governments and their populations” (usually not one and the same thing) are today. What can one regard as genuinely and desirably “revolutionary” and what must one condemn as “counterrevolutionary?” Granted, that on such a question no agreement can be found between western liberal democracies and communist states, but there is no agreement even among the communist states themselves. In face of the disastrous civil war in Nigeria, can one reduce popular expectations to simple categories such as “revolutionary” and “counterrevolutionary?” Certainly, humanitarian ideals call for centralized, vertical intervention but how can consensus be gained in the United Nations General Assembly about the forms and directions of such intervention? It is easier to suggest a negative law of non-intervention than a positive law of intervention unless one becomes a formal majoritarian and simply trusts the shifting majorities of the United Nations General Assembly.

Undoubtedly, Part II of Professor Falk’s book offers the most instructive and thought-provoking material for anyone interested in civil strife and foreign intervention, probably the most dangerous developments of our international system. The Bay of Pigs, the Stanleyville episode, and other cases of United States intervention offer many lessons to the policy maker and to anyone seriously concerned with the relevance

18. *Id.*

of international law today and tomorrow. These chapters make good reading and are not overladen with social science concepts and verbiage. There is hardly an angle which Professor Falk neglects, hardly any view or argument that he does not comment on. This is, perhaps, for the lawyer and the well-informed citizen the most valuable part of the book.

It is not with Professor Falk's analyses and narratives that this reviewer finds it hard to agree. It is his philosophical foundations and his prescriptive messages—and the two are closely connected—which seem much less convincing. Throughout his book, Professor Falk has moved quite far from the sociological "realism" of McDougal's outlook on international law. This in itself is not at all disturbing. It is when Falk embraces "World Law" as the instrument of a particular kind of "social engineering" that it is impossible not to express strong doubts. What exact or even approximate values could such "World Law" today express? Sometimes, it seems, that Falk identifies it with the expectations of Third World countries, and sometimes with a newly emerging consensus of the American public. Yet, the content of neither morality is easily identifiable, let alone verifiable.

Professor Falk has certainly proven that present international law is woefully inadequate whenever it is called upon to restrain the use of force, or the accumulation of potential force. But is it useful to devise an international law more appropriate to such conditions? Can the international lawyer change the behavior of the states within the existing structure, or can he boldly step out and change the structure itself? The positive morality of the United Nations General Assembly cannot be readily recognized. It is not even a "natural law with a changing content." It is far too heterogenous to be translated into policy and law. Undoubtedly, we live in a revolutionary world in the sense that our international system is rapidly changing, but it is not possible to tell in *what* direction. It is, perhaps, incorrect to speak of "structure" at all in the sense of something which is stable and clearly recognizable. International law has a significant role to play in the countless peaceful relationships and processes which keep the world going in more or less civilized and cooperative ways. It is exactly in the management of force where we continued to depend on "deterrence," "self-help" and "self-restraint." Centralized control of military power still seems Utopian. Technological transformation makes it highly speculative even to dream of the exact nature in which force will be or could be exercised in the future without universal suicide. This reviewer, though much impressed by Falk's erudition and persuasive powers, agrees with Stanley Hoffmann:

Only when the international system will be less heterogenous

than it is now, when there will be more 'poles' of power, fewer ideological passions, less unevenness in development, greater internal stability in the new states, will one be able to turn the *ad hoc* management of conflicts—kept moderate only by the fear of holocaust—into a legalized restraint on force arising out of basic social and political forces of moderation. The transformation of a system . . . is a long enterprise . . . International law has a modest role, principally outside the realm of force. Once the task is accomplished, it will have a bigger and better role in the realm of force as well.¹⁹

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19. *International Law and the Control of Force*, in K. DEUTSCH AND S. HOFFMANN (eds.), *THE RELEVANCE OF INTERNATIONAL LAW, ESSAYS IN HONOR OF LEO GROSS* 46 (1968).

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