Radical Perceptions of International Law and Practice

A. A. Fatouros

*Indiana University School of Law*

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Recommended Citation

Fatouros, A. A., "Radical Perceptions of International Law and Practice" (1972). *Articles by Maurer Faculty*. 1891.
https://www.repository.law.indiana.edu/facpub/1891

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The Chairman concluded with this question: Can the United States have confidence in the adjustment process? Once obligated the United States wants confidence it can meet its obligations. The August 15 decision not to convert dollars was not at all a comfortable one. It meant, for instance, being the receiver of brickbats as an official representative of the United States. No one wants to be faced with a breakdown again.

John F. Algood
Reporter

Radical Perceptions of International Law and Practice

The roundtable was convened at 8:35 p.m., April 28, 1972, A. A. Fatouros* presiding.

The Chairman indicated the background and rationale of the roundtable. During the last decade, there has been considerable criticism of the social sciences, especially of history and political science, disciplines closely related to international law, from what have been described as radical points of view. Such criticism challenges not only the conclusions of orthodox scholars but also the basic methodological and ideological assumptions and biases of the disciplines themselves. Alternative interpretations have been proposed and the purposes of scholarly research have been questioned. In domestic law, as well, radical lawyers have raised fundamental questions concerning the basic premises of the legal system. New interpretations of legal realities have been put forward and the assumptions and even the style of the profession have been questioned. In the area of international law such trends have been far less evident. There have been criticisms of the way in which states and particularly major powers have manipulated international law for their own purposes—but this after all is not a new phenomenon in law or in international law. Specific aspects and rules of international law have been attacked. But by and large there has been no questioning of the fundamental tenets of the international legal order and of international law. The members on the panel thought therefore that it would be worthwhile to spend two hours studying, discussing, and speculating about the actual and possible ways in which a radical perception or several radical perceptions can be articulated.

A problem of definition arose from the very beginning and has not yet been resolved: what is “radical?” We concluded that there was no single narrow definition on which we could agree and decided to proceed on the basis of a fairly broad and flexible, and therefore vague, definition. Our topic includes the actual and possible approaches to international law which stem from a point of view that questions premises and assumptions of both the theory and practice of international law as well as the social and political order reflected in it. At the same time we seek an understanding of how international law and the international legal order can better serve certain

* Indiana University School of Law.
fundamental values. Obviously, such an understanding of the term lacks precision, for it includes a large variety of viewpoints. Yet it might be better to avoid concentrating the discussion on precisely what is and what is not radical. Nonetheless it is appropriate to look at the very start at some of the diverse perceptions of what constitutes a radical approach. Prof. Johnston will start with a short discussion of his view.

**Remarks by Prof. Douglas Johnston**

It is tempting to begin by suggesting that radical perceptions of international law "questioning basic values" are perceptions that seem to challenge, if not reject, the prevailing "orthodoxy" in international law. It may be easier to agree on what is "orthodox": "radicalism" consists then of critically constructive thought that deviates in a marked degree from the orthodox. In this way, for example, the "transnational" perspective, which challenges the orthodox perception of the world community as an interstate system, would qualify as a potentially "radical" perception of international law. By the same token, an approach that rejects the classical definition of international law as a system of rules governing interstate relations and replaces it with a much broader perspective, such as that afforded by "policy science," is "radical." Non-systemically, a perception that challenges conventional assumptions about the usefulness or feasibility of particular norms as basic to the "system," such as state equality or *pacta sunt servanda*, is certainly radical.

The radical challenge need not be politically oriented. In this country alone there are several genuinely "radical" international lawyers whose radicalism is not primarily of a political nature. In particular, their political preferences in most cases owe little or nothing to the sentiments of the "radical left." We should not overvalue the perceptions of the political left, whether old or new: radical perceptions can be found on all points of the political spectrum. It may be true that the political left was the earliest source of potentially radical ideas about international law, but today there are very severe practical limitations on the ability of socialist nations to act out the policy implications of such ideas. To a large extent, radical Marxist-Leninist thought about international law seems locked into the aspirational sector of political ideology. By and large, the same is true of Third World nations, of new states, of formerly excluded civilizations. No single system of political ideology based on the history and theory of exploitation can encompass all the existing grievances that can be channelled into potentially radical perceptions of international law. Old grievances are constantly yielding to new. It may also be true, and verifiable, that as the sense of novelty wanes in the new states of the Third World, the national perception of international law tends to become more the product of "national interest" considerations and less the product of attitudinal factors, such as cultural predisposition, historical experience, ideological conviction, racial memory, and so forth.

*University of Toronto School of Law and Department of Political Economy.*
This century has witnessed the emergence of a great variety of radical perceptions. They must be seen in a crisis/response context. According to them, the existing world system is no longer effective and must be transformed. While there is some general agreement among radicals, differences exist in the identification of the major sources of danger to the stability of the world, in the analysis of factors creating existing problems, and in the selection of strategies to accomplish specified goals.

We can detect two basic radical approaches. First, the revolutionary approach, seeking the creation of a new world through the destruction of the existing system. Revolutionary activists perceive international law as largely irrelevant to the central problems of our time. Radical anarchists, Trotskyites, Che Guevarists, Maoists, as well as transnational organizations such as the Organization of Latin American Solidarity, Tricontinental, and the Popular Front of George Habash, follow this strategy. Second, the peaceful transformation approach, seeking to evolve an adequate system through radical reform. International law is perceived as both a convenient instrument and a useful transition device. The democratic left as well as the "new" socialists, in both the developed and developing world, use this strategy. Included in this group are also those radicals that downgrade the role of the states and favor their displacement by new actors, such as the radical world federalists, neo-functionalist, and transnationalists.

The perceptions of the "new" socialists—governments and groups, as well as individual writers—are too often ignored in the United States. Too much attention is given to the more orthodox legal views of the Soviet Union and China. Among the "new" socialists in Romania, Yugoslavia, Western Europe, and the socialist-oriented developing states, there is a deep concern with evolving socio-economic trends and underlying scientific and technological forces. Their general conception of law is dynamic and evolutive and against conformism and dogmatism. They articulate the changes desired by the socialist and Third World states and are developing a socialist body covering the whole of international law. They share with the democratic left a rapidly awakening insistence that we utilize our ability to shape the conditions of our existence. In order to survive, the international legal system must adjust to the emergence of this new international force and provide channels for orderly change.

The Chairman observed that in trying to go beyond definitions into substance, the basic question becomes, what difference does it make to refer to a "radical" perception? Some of its particular characteristics have been mentioned in the preceding comments. An important and widely accepted characteristic is an emphasis on values; a radical perspective, if it does not necessarily reject the possibility of value neutrality, at least insists on explicit discussion of value premises. This is not uniquely radical, of course. What is important perhaps is the manner in which such features appear

* City University of New York, Department of Political Science.
and are understood. There is, then, considerable emphasis on the necessity for an understanding of international law that considers and discusses values.

**Remarks by Prof. Kay Boals**

The major task of a radical approach to the international legal order is to develop methods of analysis and substantive principles that connect international law to emerging historical trends and forces. Conventional legal analysis in the West attempts to couch principles in universalistic terms and is ahistorical in its approach to international conflicts. These two facets of conventional analysis are, of course, closely connected, since without some analysis of historical trends and underlying socio-cultural forces there is no real basis on which to make a non-ideological distinction between an action or claim when made by one state and a similar action or claim made by another. I am suggesting that it is necessary to link legal analysis to the movement of history.

Two important gains from such a change in the habits of legal analysis would be: First, it would be possible to join far more directly and usefully the debate actually going on in international politics about the direction in which history is moving. In the area of intervention, for example, the United States, the Soviet Union, and the United Arab Republic all justified their respective interventions in Vietnam, Czechoslovakia, and Yemen on the grounds that they were acting in tune with the wave of the future. While their visions of the direction of historical development are different, their commitment to thinking in those terms goes very deep. Thus, if legal analysis is to be relevant in this substantive area (and if it is to understand what may otherwise appear to be contradictory or merely unprincipled governmental rhetoric and behavior), then we must become accustomed to viewing particular actions, claims, and disputes in historical context rather than in atomized isolation.

A second advantage to be gained from this shift in perspective is that we could begin to move away from the existing exclusive emphasis on what was done and whether that particular action is abstractly permissible or not and ask in addition who did it, to what purpose, and with what likely effects on the future of the international legal order.

To be radical is to deal with roots. The roots of the international political-legal process are to be found in underlying historical trends and forces. Thus, if legal analysis is to be genuinely radical, it must be rooted in an analysis of those forces.

**Remarks by Prof. Nigel S. Rodley**

In my own definition of radical perspective, I think the key word has to be anti-imperialist. It is in the anti-imperialist struggle, particularly in relation to Vietnam, that many people have come to define themselves as radical

*Princeton University, Department of Politics.
**New York University, Center for International Studies.
and may have developed political and economic and social views that are far different from those they had before the war and the anti-imperialist struggle associated therewith. This leads to various possibilities. If, as many anti-imperialists believe, it is impossible for a society with economic structure following the Western model not to be imperialist, if such a society must dispose of surplus capital abroad and then defend it, this has implications—for example, for foreign investment, concession agreements, and a whole range of international and transnational activities which anyone seeking to formulate norms of a coherent legal order must come to grips with. The problem, of course, is how is this to be done. I think that Kay Boals has put her finger on a key lever—the idea of historical inevitability. She raised the problem of defining precisely what the direction of history is; my guess is that those who were radicals in the 'fifties could have told those who were imperialists in the 'fifties that they would have been out of Africa and Asia in a given period of time. The radicals of today can probably tell the imperialists of today that the foreign investment and military activities the West has been pursuing in the Third World are in fact a doomed force; attempts to formulate norms of reciprocity granting the imperialists the same kind of rights as the anti-imperialists are going to be fairly meaningless.

Despite that, we may be tending to ignore the possibilities of traditional international legal techniques. We seem to forget that it is no longer 1919, when the Russians were struggling for the acceptance of new concepts by the international community. Now, many countries in the world, controlling probably a sizeable majority of the world's population, challenge many of the concepts that Western international lawyers still try to maintain, despite their own doctrine. I can think of one recent example. At a panel of this Society's, we were analyzing the nine draft articles on state responsibility that Roberto Ago has prepared for the International Law Commission. One article (Article 8) says that persons or groups of persons who perform public functions act on behalf of the state and can engage the responsibility of the state in the same way that a government can (UN Doc. A/CN.4/246/Add.3, p. 2, May 18, 1971). For several of my colleagues this quite clearly meant that the activities of guerillas can engage the responsibilities of a state in which they operate. I suggested that under this interpretation and given the perceptions of the majority of the world community, General Motors, General Electric, General Dynamics, and other such entities could engage the responsibility of the United States, since there are few countries in which nongovernmental organizations perform the functions that these particular companies perform. My observation elicited little sign of comprehension and was greeted with a thunderous silence. Yet I think it does point to one of the real problems we have to face—that traditional techniques have clearly not been value-free, at least in their application, but they can be used now by anti-imperialists against imperialists with far greater success than could have been the case before.