

Legal Order in a Violent World

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BOOK REVIEW

Legal Order in a Violent World. RICHARD A. FALK. Princeton: Princeton University Press. 1968. Pp. xvi, 610. \$15.00.

There is little question that Richard Falk, currently Milbank Professor of International Law at Princeton University, has contributed a rare sophistication and depth to international legal studies. His perceptiveness and capacity for analysis are equaled only perhaps by Myres McDougal of the Yale Law School, an international legal scholar who has figured significantly in Falk's intellectual development. Beyond persuasiveness, however, the policy orientation of Falk and McDougal has made their work essential reading for anyone interested in the critical issues of world order and the relationship of law and legal perspective to world politics.

Falk has much to say to international lawyers and to political scientists of international relations. For the lawyers he has added, along with McDougal, a broad range of policy insights and normative considerations, all too often missing in traditional international legal writings. International law texts, casebooks, and articles tend to present the reader with narrow analyses of particular rules and cases, with relatively little in the way of underlying policy foundations or norms that might assist decision-makers and private elites to chart alternative (and less threatening) paths to peace among nations.

Falk's and McDougal's contributions to political science have in a sense saved the field from almost certain extinction. Following the post-war effort to bring to political science the techniques and insights of modern empirical social inquiry, international law fell rapidly from the heights it once enjoyed as the core of international relations study in the United States. It is often viewed as marginal to the crucial decisions of world politics; and given the traditional methodology and approach, political science found little to recommend it as a field of study. But modern weapons technology, particularly nuclear systems and rapid delivery techniques, has imparted a sense of urgency to the search for alternatives to the arms race, and Vietnam has inspired a will to write new rules of the game for intervention in internal wars. These two most critical foreign policy issues of our time lend themselves to efforts looking toward committed behavior over time—the essence of law. International law thus takes on new importance for the political scientist, and McDougal's and Falk's concentration upon conceptual and empirical analysis provides an attractive methodology.

Falk's work is also important because his central theme is the gradual transfer of power and executive responsibility to the organized international community, represented by the UN, and to regional agencies. There has been a gradual development of supranational institutions at both the regional and global level and a painfully slow movement toward a more substantial enmeshing of national policy-making in the fabric of such institutions. For example, a study of American foreign policy is no longer complete without analysis of United Nations functions in the area of conflict management, for the one has been shaped and influenced by the other. Supranational organizations are of obvious importance to both international lawyer and political scientist, given the law-creation role of such structures as the United Nations and the Organization of American States, the increasing significance for world politics of these bodies, and the behavioral analyses their structures and processes allow.

Legal Order in a Violent World is not a single coherent study but rather a collection of fifteen essays. Ten of these were published by Falk between 1960 and 1967, and three others were circulated at Princeton's Center of International Studies in 1965 and 1966. Although there has been some revision to produce a single volume, this kind of effort can never be entirely successful. Repetition and disjointedness occur with some frequency, but this seems a small price for the convenience of a generally well-integrated analysis of the role of law in the international arena.

Part One, "A Statement of Outlook," and the first segment of Part Two, "Civil Strife, Intervention, and Minor Coercion," are by far the most significant sections of the book. Here Falk attempts a concise delineation of his view of the role of law in regulating international conflict, discusses the policy and normative bases upon which all else rests, and delves with brilliant insight into the international law of internal war. There follows, in Part Two, a review of American non-intervention practice and doctrine, a study of law and the 1961 Cuban disaster at the Bay of Pigs, two chapters on the legal propriety of United States involvement in Vietnam, and a consideration of the 1964 Stanleyville rescue operation and the African reaction thereto. Part Two concludes with a proposal for more liberal UN intervention in the internal affairs of sovereign states, particularly in cases of severe human rights repression, and a plea for caution in current attempts to regulate international propaganda. Part Three, "Nuclear Weapons," begins with a discussion of the *Shimoda*¹ case, in which the District Court of

¹ Judgment of Dec. 7, 1963 (Tokyo District Court), in JAPANESE ANNUAL OF INTERNATIONAL LAW FOR 1964, 212, *digested* in 58 AM. J. INT. L. 1016 (1964).

Tokyo held the atomic bombings of Hiroshima and Nagasaki to be in violation of international law, and continues with essays on minimizing nuclear weapons use and supporting a no-first-use proposal. Part Four, "A Disarming World," is a long essay on disarmament proposals in the context of control of indirect aggression and subversion.

The first four essays and the classification of conflicts for purposes of rule-making concerning intervention in internal war deserve the closest study. The overriding issues of international relations are the development of nuclear weapons and the frequency of internal wars accompanied by external intervention in attempts to secure influence over nation-building. The two are closely related, for the distinction between civil and international war has become blurred, and the risk of competitive intervention escalating into large-scale confrontation cannot be minimized.

Although Falk recognizes that nuclear weapons have substantially reduced the chances of major conventional warfare, and that violence is still a form of "legislative energy"² in international life, his basic contention is that starting with World War I, the costs of legislating in this fashion grew too high. Even though the risk of nuclear exchange is speculative, it is nonetheless real, establishing terror as the central ordering principle of our time, and threatening mass destruction to preserve a security "reduced to the rudest form of physical survival."³ Falk rejects the system as "dehumanizing," entailing unacceptable ethical and moral costs.

Political scientists must therefore devise alternative systems of order, and Falk suggests that scholars and decision-makers expand their considerations to the issues of twenty or forty years hence, because a longer-range perspective is less likely to be conflict-oriented. He questions whether the nation-state can remain the primary focus of loyalty if satisfactory substitutes for war are to be devised. There must be increased willingness to subordinate national policy to regional and global planning in the peacekeeping area, deference to the emerging consensus in the international arena prohibiting nuclear weapons, and primary ethical allegiance to the world-wide community of mankind. What Falk calls for is a transition strategy looking toward a shift from international to supranational systems, and this is nothing less than a thorough-going dissent from the views of decision-makers and specialists in world politics concerning the role of military power, its relationship to national security, and the justification for national control over the most ominous of weapons.

² P. 14.

³ P. 21.

In addition to analyses of alternative systems of order, political scientists will have to concern themselves with nonrational forces. The "ethical transformation of political man" is essential because the present system is so enmeshed in the culture that nothing short of a reshaping of political consciousness will induce desired changes. The arts are vital to such an undertaking, and Falk calls for increased attention to literature and psychoanalysis and for a joining of traditional and modern approaches to political science.

Falk concedes the uncertainty of the task:

The entire enterprise of advocating and opposing particular systems of world order rests for the foreseeable future upon the unreliable foundation of intuition, ethics, and life-style. Furthermore, there is no accumulation of data that will objectify our choices, operationalize our crucial speculative perspectives, or rescue us from the essential contingency of our judgments.⁴

His underlying philosophical position brings to mind the debates between "realists" and "idealists" that once dominated international relations discourse in the United States, for the old arguments have assumed new relevance in the nuclear age. We may have no certain evidence concerning the basic nature of man, but for that very reason it appears irrational to deny that an attempt at ethical transformation is worthy of substantial effort.

Arguably the education process that Falk hopes for is already underway, although it is slight indeed in comparison with essential requirements of national movements toward a more rationally structured world order. One of the latent functions of the United Nations is law-creation and the establishment of cooperation-oriented ideology that slowly and subtly is becoming intertwined with national policy-forming processes among the great powers. Moreover, nuclear weapons control and Vietnam have taught the international community much about the possibilities of shaping new attitudes and the limits of military power. This is not the ethical transformation of political man that Falk seeks, but the first tentative steps have been taken, and one can appreciate the importance of increased effort along these lines, whether one's perspective on world order is reformist or revolutionary. Perhaps nuclear weapons have given us, through credible threats of unimaginable destruction, the capacity to avoid large-scale warfare and thus the time to reflect upon the necessity for constructing alternative models of international systems.

But what of the legal perspective? What is the function of law in a decentralized international arena in terms of regulating conflict and

⁴ P. 28.

serving as a mechanism for a transition strategy? This may be a second-order question, for the current conflict orientation obviously does not augur well for legal order. Yet there is always a mix of conflict and cooperative patterns, and since law is both a reflection of and a guide for social policy, it may be equally at home in both settings. The idea is to work toward a greater number and scope of cooperative structures and processes through legal mechanisms, particularly in areas that tend to engender violent conflict. Falk's essay on legal regulation of conflict is particularly astute in that it clearly analyzes the plurality of legal orders that make up international law and contains many insights concerning the relationship of law and human conflict. Falk emphasizes the continuing relevance of classical international law to such areas as recourse to violence, general conduct of warfare, limitations on weapons use, and individual and state responsibility. But he urges that law may also be understood as a means for asserting claims:

[O]ne of the major contributions of law in conflict situations is to provide a regular and highly articulated procedure for the assertion and refutation of national claims. The claiming procedure enables precise communication to take place in a horizontal authority structure.⁵

Nations must demonstrate the reasonableness of their claims, and law provides the means to do this through "rhetoric, analogies, and . . . standards."⁶

Both the author's exposition of his underlying policy position and the essay on the role of law would benefit by reference to some of the recent work on political integration. If there is to be any meaningful change in man's basic conflict orientation, and if law is to be of some assistance in shaping a more rational peace system, it seems imperative to devote more attention to the process and theories of integration. There is no single coherent theory of integration, and difficult definitional problems remain, but the variables to be studied — for example, mutual values and knowledge, transaction flows, and the responsiveness and effectiveness of governmental institutions—allow one to construct a rudimentary framework within which the techniques for transition to world order can be scientifically analyzed. Thanks to scholars such as Deutsch, Haas, Russett, Etzioni, and Jacob, we now have a far greater understanding than formerly of the significance of integration theory. Lawyers or political scientists interested in international system change must concern themselves with the works of these scholars, for integra-

⁵ P. 67.

⁶ P. 68.

tion is, in the final analysis, what international law and organization are all about.

The third essay of great importance in *Legal Order in a Violent World* is Falk's critique of "McDougal and Feliciano on Law and Minimum World Public Order." McDougal's jurisprudence demands a policy-oriented basis for the legal process, and calls for explicit policy-making by national and international decision-makers with the "values of a public order of human dignity" assumed as the preferred normative foundation. The policy to be secured is not simply the result of national whim, but is ostensibly set forth in accordance with the methods and knowledge of the social sciences. Law is an instrument of policy for McDougal, and the consequences and implications of any legal decision or process must be clearly revealed. For McDougal, the Western conception of human dignity and democracy must form the basis for all law, and international legality depends in large measure upon the extent to which decision-makers, national or global, implement the Western notion.

Falk argues persuasively that a world legal structure that treats as law "what helps a certain set of policies to prevail in the struggle for power"⁷ is not supportable in a world of diverse political and social systems. Under such a legal structure, for example, Soviet claims to the use of force would necessarily be far more restricted than those of the United States, since communist goals are deemed the antithesis of human dignity. The resultant asymmetry is not conducive to any kind of world order, and the problem is aggravated by growing multi-polarity. Other conceptions of human dignity will be held with as much conviction as our own, and because there is a paucity of social-scientific evidence indicating which conception is superior, the inevitable result is the very conflict orientation that international law is designed to overcome. In addition to common interest in avoiding nuclear war, it is desirable to limit national discretion on the basis of objective and visible boundaries between the permissible and the impermissible, such as the line between non-nuclear and nuclear weapons.⁸ McDougal's perspective blurs such boundaries, weakening the already limited ordering possibilities of a decentralized system. This and other fundamental objections raised by Falk indicate McDougal's failure to devote sufficient effort and analysis to the broader perspective of a world order that allows for diversity.

McDougal's extreme policy-oriented approach to international law

⁷ P. 88.

⁸ P. 94.

entails a great sacrifice in international affairs. Law as an instrument of policy in a well-integrated society is one thing, but in a diverse community a decisive emphasis on this kind of flexibility, in contrast to a rule-oriented approach, may severely weaken the fabric of international law. Taking the point further, it is consistent with the needs of world order for vertical decision-making, such as UN resolutions, to be based upon conscious policy formation, but in a horizontal setting, beset with so few effective institutions and with enormous conflict, the result will be a continued or even worsening conflict orientation. Co-operative relationships among nations and a rationally structured peace system cannot endure constant national reiteration among international lawyers of favored policy objectives. There has to be a search for clearly stated rules capable of influencing behavior. The search is difficult at best; McDougal, it seems to me, makes it more difficult still.

Falk analyzes McDougal's contextual approach to the question of nuclear weapons use in his discussion of the *Shimoda* case. By close study of *Shimoda*, he demonstrates that the wider the context and the greater the number of variables chosen as relevant for the judgment of propriety, the greater the possibility of manipulation and narrow partisanship in the international law creation process. On the other hand, the intrinsic approach, although it will be irrelevant if over-permissive and ignored if too restrictive, provides clarity. A well-framed positive rule is more conducive to world order than the all-embracing context route espoused by McDougal, particularly in critical areas where definite boundaries are possible, such as nuclear weapons. Contextual analyses unquestionably provide flexibility and allow for timely realpolitik and normative considerations. But McDougal's approach blurs clear boundaries, minimizes committed behavior over time, and maximizes national aspirations and discretion; the end result might be a strengthening of the state-centered international system. A limited contextual approach, as utilized in *Shimoda*, is perhaps a workable method, and one to which Falk appears sympathetic. But McDougal's more extreme jurisprudence could hamper attempts to reach limited agreements on particular projects, such as nuclear weapons limitation. It is remarkable, for instance, how much more creative Falk is in this regard than McDougal. The latter's writings are almost devoid of the kind of substantive proposals, such as a no-first-use agreement, that characterize Falk's articles, and it is difficult to escape the conclusion that a substantial reason for this is the cast of mind that insists upon an overriding flexibility of legal decision-making.

In the fourth crucial chapter of the book, Falk begins a considera-

tion of internal war, one of the most significant issues of our time, given the tendency for current international wars to be fought out in internal settings in the Afro-Asian world. The line between international and civil war is less distinct than in former years, and, of course, competitive intervention by great powers creates a risk of escalation and large-scale confrontation.

Falk reviews the traditional rules on intervention and calls for increased capacity for international organizations to authoritatively find facts, authorize intervention, and possibly intervene themselves. Falk is willing to permit external intervention on behalf of either side in an anti-government insurgency, but only if legitimized by some central process of decision,⁹ most desirably through the United Nations. Classical international law is rejected because the discretion to intervene which it allows to nations is destabilizing and dangerous. Furthermore the old law is insufficient in that it justifies intervention on either side, government or "just" (thus the just-war orientation of communist claims to intervene on behalf of wars of national liberation). Nonintervention must also be rejected, since it is inappropriate in an interdependent world unless there is symmetry of abstinence by the great powers, and the old law cannot assure symmetry. The most rational response to the problems of internal war, therefore, is supranational management and regulation.

Falk is careful to distinguish cold war issues from those concerning colonialism and racism. In the first case, decentralized patterns will continue to prevail; in the second, vertical processes are becoming significant. UN certification of a regime as colonial or racist is now sufficient to suspend non-intervention norms and allow action against such "illegitimate" governments, but the consensus must be overwhelming and include the support of the superpowers.

The more difficult issue is internal war waged by communist insurgents against repressive regimes, and, in this context, supranational management is not likely to be eminently successful. Falk does not stress this as one of the problems with his approach, but it deserves consideration, for a relentless struggle waged by powerfully motivated and ideologically committed revolutionaries will hardly be influenced in any serious manner by the United Nations or regional agencies.

Perhaps the most salutary effect of which international organization is capable is marginal limitation on external intervention subsequent to classification of the conflict in accordance with agreed substantive rules of the game. Falk distinguishes four fundamental types

⁹ P. 145.

of violent conflict.¹⁰ Type I involves the traditional direct attack by a massive force across an international frontier, the case provided for by article 51 of the UN Charter, giving rise to a right of individual or collective self-defense and a right to act unilaterally, at least in the first instance. Type II signifies an internal conflict with significant external assistance to one side justifying a neutralizing response by other external actors subsequent to peaceful settlement attempts. The interventions may be offsetting, but should be confined to the original area of conflict. Type III is a civil war without external participation, and so long as an internal conflict remains Type III, as Falk contends Vietnam did until substantial American involvement in 1963, outside powers have no legal right to intervene. Type IV involves an authoritative judgment by an international organization (global or regional) authorizing the use of force, illustrated by Korea, Suez, the Congo, and Cyprus.

Falk's analysis assumes a continued decentralized process of intervention, but he hopes that community decision-making can make true residual categories of Types I to III. His analysis is most pertinent to what he labels the "Tertiary Security Zone,"¹¹ that is, the Afro-Asian nations outside the immediate spheres of interest of the great powers, states newly independent and generally nonaligned in East-West disputes. What the United Nations can do along these lines is problematical, but rational limits on intervention in internal conflict situations must somehow be constructed. Perhaps Vietnam will propel us toward reconsideration, and given the extraordinary persuasiveness and insight of Falk's proposals, the organized international community would do well to consider them as a possible foundation for an emerging international law more responsive to one of the most critical issues of current world politics.

The section in *Legal Order in a Violent World* devoted to nuclear weapons is shorter and less complete than the analyses of internal war and intervention. The discussion of *Shimoda* is followed by creative and once again persuasive thoughts on minimizing the use of nuclear weapons and a no-first-use proposal. Since this is the one area of weapons limitation in which significant progress has been made, it is unfortunate that Falk does not include some discussion of recent legislative enactments, such as the limited test-ban treaty, the non-proliferation agreement, and agreed-upon or recommended nuclear-free zones such as outer space, Antarctica, the sea bed, and Latin America. Encouraged by the Afro-Asian group, the world community is slowly moving toward

¹⁰ Pp. 227-29, 273.

¹¹ P. 312.

a legal prohibition on nuclear weapons, and although the step-by-step approach is tortuous, the educational value of the process seems essential. It would have been helpful had Falk addressed himself to some of these problems.

Although some might prefer a unified book-length study of the role of law in regulating conflict and serving as a mechanism for transition to a peaceful world, there is no question that Falk's contribution in *Legal Order in a Violent World* is brilliant. He has the capacity to work at the edge of things, to find with remarkable insight the larger meaning in the critical areas of world law and politics, and to formulate imaginative and intelligent proposals looking toward a warless world. We are much the better for his critique of some of our basic and often unquestioned assumptions, and I have little doubt that his influence will be significant in shaping the intellectual climate and perspective that are essential for any important shift by mankind toward a more rational and ethically based system of world order.

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