The Revival of the International Law of War

Law, Morality and War in the Contemporary World by Richard A. Falk. Praeger, published for the Center of International Studies, Princeton University, (Studies in World Politics: No. 5), 120 pp., $4.00.

by William V. O'Brien

The publication in 1981 of Myres S. McDougal and Florentino P. Feliciano's Law and Minimum World Public Order furnished impressive evidence of the growing interest among international law scholars in the revival of the international law of war. Now a former student of Professor McDougal, Professor Richard A. Falk of Princeton, has added a slim volume of essays on the same subject. Interestingly, Falk introduces a normative element into his writing which is only implicit in the work of McDougal and Feliciano. He openly refers to moral values as the indispensable bases for a viable international law of war in our age of conflict and nuclear dangers. At long last, then, we are finding legal scholars who recognize that jurisprudence that is cut off from morals cannot meet the requirements of modern international law. In a telling sentence, Falk proclaims that "Our normative heritage is a resource that we can no longer afford to squander."

It is widely believed by lawyers and laymen alike that the function of lawyers and legal scholars is to interpret rules, rules that have come from somewhere. If there are no rules, there is no legal problem. Falk calls upon the international lawyer to analyze the normative implications of contemporary international conflict of all kinds and to offer normative and intellectual vehicles for introducing our values into the conduct of our foreign and defense policies. In other words, our problems today call mainly for law-making rather than for interpretation of existing law. International law is not "legislated" by some Olympian body; it results from the practice of states. The practice of states, in turn, results from the practical decisions of the decision-maker. Falk, in the McDougal tradition, is concerned with providing the decision-maker with normative "referents" rather than neat capsule judgments about the legality or illegality of various forms of coercion.

It is interesting to see how Falk handles the problem of introducing morality into a legal analysis. He accomplishes this through a concept of "justification." "Justification" refers to the range of considerations more usually identified as "the moral dimension" or "human conscience." "Justification is a moral referent that expresses a moral context without requiring us to enter the debate between the various types of natural law and the several versions of legal positivism." He notes that "there is no necessary coincidence of moral and legal norms, although adherence to law rests ultimately upon the moral confirmation of its rules."

Falk's general approach to the dilemma of avoiding nuclear war and Communist conquest rejects the extremes of militarism and pacifism and unilateralism. Although sensitive to the occasional rays of light that indicate some change in the Communist camp, Falk is properly conservative in his estimates of our continuing requirement for external and internal defense against Communist aggression. At the same time he is persistent in his search for "restraints" on recourse to war and on the means used in war. He emphasizes that "restraint in warfare should not merely reflect the outer limit of what it is militarily advantageous to do in order to bring victory in a conflict."

The search for normative restraints on conflict is carried out in terms of two sets of concepts, "horizontal" and "vertical international law"; and "legitimacy" and "justification." "A horizontal norm is a descriptive proposition about what nations will probably do in the light of the interplay of event, interest, conscience and rule; it is a predictive generalization that acts as a comprehensive ground rule for behavior." In other words, horizontal international law is the product of state practice. Vertical international law does not really exist in the sense that domestic law is "vertical." "Domestic society relies upon effective vertical concentration of authority and power to compel its members to accept normative restraints." (emphasis added.) But no such compulsion by a superior authority exists in the international order. An important consequence of this basic fact is reflected in the whole approach of the McDougal School. The pressing task for the international lawyer is not simply to characterize acts or policies as legal or illegal, for there is usually no way that such a finding could be implemented with legal action against the delinquent part and the law is not that clear anyway. Rather, the task of the international lawyer is to seek to influence the horizontal law in process of evolution.

Underlying these two types of legal order are two normative concepts, legitimacy and justification. "Legitimacy refers to the legal status of a use of force." "Justification," which we have already seen defined, "refers to a demonstration that a given legal status corresponds with relevant

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moral requirements.” Falk contends that there is a basic unity of legitimacy and justification and that “the failure to perceive this unity is a serious and dangerous deficiency of most national approaches to international law.” He concludes:

An essential component of legitimacy is justification and a usual component of justification is legitimacy. Since justification is treated as essential to legitimacy, it is correct to identify this essay as being in the natural-law tradition.

It will be seen presently that this higher law element in Falk’s thought plays a vital part in his handling of the nuclear problem.

When he attacks the specific problems of finding restraints in international conflict, Falk begins with a rather absolute right of self-defense against armed attack which, he says, is possessed by all states. “The basis of self-defense is the right to defend existence per se rather than the value of the self that is being defended.” Not every reader will accept this point of view. Perhaps it can be questioned on moral grounds but it is difficult to see how a different approach can be taken in terms of law. Even the Nuremberg decision rejected the proposition that there should be one law for the angels and another for the devils! What, then, is the task of the international lawyer in elaborating the right of self-defense? Falk says that it is “to translate the imperatives of military security into a series of tentative propositions about the legal control of international force.” Let us turn to some of Falk’s own propositions. Among the most prominent:

(1) There should be a working definition of aggression. Even if it were imperfect and subject to frequent revisions it would tend to reduce uncertainty about the likelihood of armed conflict. Falk criticizes the United States for its refusal to agree to such a definition because of “the risks of self-restriction.” I wonder whether this is really a valid criticism. Is it not at least arguable that the United States does not react with force to many acts which would probably be termed “aggression” by any standard? Do we not already have immanent restrictions resulting from the nature of the balance of terror? Would a formula for defining aggression add significantly to these restrictions?

(2) There is a continuing need for legitimate recourse to force because of the “horizontal distribution of authority, the bipolar concentration of power and the ineffectiveness of vertical institutions and procedures.”

(3) Moreover, there is a vital need to replace the inadequate categories of “war” and “peace” with “normative categories that can accommodate the wide range of techniques by which and objectives for which force is used in international affairs.” One such category might seek to distinguish legitimate from illegitimate intervention, an enormous subject which we simply note here.

(4) Falk subjects nuclear war to normative analysis and finds that in terms of “the formal norms of the vertical system, it would appear that a strong case against legality exists.” However, he believes that there is also a good argument for use of nuclear weapons as deterrents against Communist aggression, deterrents for which there are simply no substitutes.

Given the horizontal nature of international law, the fact that states are preparing for nuclear war, Falk contends that we should “shift from the trivial directives of vertical norms that appear to proscribe the use of nuclear weapons in international affairs to the crucial content of horizontal norms.” He then submits that there is a “minimum horizontal norm,” namely: “The initiating use of nuclear weapons must take place in a clear situation of individual or collective self-defense against a prior armed attack that has been carried across an international boundary and threatened the territorial integrity and political independence of... [a state eligible for UN membership].” Every possibility of adequate conventional defense must be exhausted before using nuclears. Moreover, if the aggressor uses nuclears first, “then the defensive nation is entitled to make a proportionate counterstrike against military targets,” i.e., only counterforce warfare is permissible.

- It must be observed that there appears to be a difference between this treatment of recourse to nuclear war and that which Falk posits in the beginning of the book. There he says that he will be taking the position that “under no circumstances except in the event of a nuclear armed attack is it permissible to have recourse to nuclear weapons; a state must defend itself with conventional arms against a non-nuclear attack even if the alternative to the initiation of nuclear war is national surrender.” (emphasis added.)

I have tabled minor points of criticism in order to present the main line of Falk’s approach to a new law of war. Aside from the apparent inconsistency of his treatment of defense against non-nuclear attack, my main criticism, if indeed it can be so termed, is that this little book of “essays” only sketches an “approach.” It does not really grapple in depth with the problems to which it alludes. Much of the argumentation is simply set out to be accepted or rejected. Professor Falk’s ideas and the stream of international legal philosophy which they represent deserve more than this; and, certainly, the subject matter requires more. It is to be hoped that this is but a brief introduction to more extensive analyses of this vital subject matter.