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Book Review

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BOOK REVIEW

THE STATUS OF LAW IN INTERNATIONAL SOCIETY. By Richard A. Falk. Princeton University Press. 1970. Pp. xvi, 659. \$15.00.

The Status of Law in International Society is an interesting and useful book, but, in the opinion of this reviewer, a substantial disappointment. Opening it with high hopes, he closed its 659 pages with a feeling of frustration that it was not the book it should have been. The reason is that it promises more than it delivers.

On the jacket, the reader is promised "special attention to the political setting which shapes international law and the intellectual perspectives that contribute most to the strengthening of world order."

In the introduction, the reader is promised "a coherent and self-consistent interpretation of the role of law in world affairs" and "a conception of the international legal order that effectuates a reconciliation between these intertwined considerations of autonomy (Kelsen) and relevance (McDougal)."

The reason for the disappointment is fairly obvious. The book is not a single, harmonious whole; it is not a careful study of the philosophical positions of Kelsen and McDougal and an effective reconciliation of their differing positions; and, above all, it is not a coherent, self-consistent, tightly written brief in support of the author's own philosophy of international law.

Rather, the reader is given a series of independent, separately written law review articles and other essays (many of superior quality), written at different times and for different purposes. Some discuss topics which have only peripheral connection with the asserted central theme of the book. In a critique of McDougal's "Studies in World Public Order," which Professor Falk much admires, and which is also a collection of independent essays, he notes that "It is the unity of McDougal's jurisprudential outlook that bind (sic) together the twelve essays . . ." Unfortunately this collection of twenty-three essays and nearly fifty pages of appendices does not have equivalent unity.

Twenty of the essays have been previously published; some are irritatingly out of date. Nothing appears to have been made current later than March, 1969. In a book published in 1970, President Nixon is never mentioned; Lyndon Johnson is the President.

Several of the essays must be read with care because of this obsolescent character. Chapter XI is an argument in support of the McDougal theory of treaty interpretation. As Ambassador Kearney reported (64 Am. Jour. Int. Law at 519-20) this received "scant support" at Vienna, and its rejection "was a foregone conclusion." The discussion of *Sabbatino* in Chapters XIII and XIV only goes up to early 1968 and makes no mention of *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*¹ or *French v. Banco Nacional de Cuba.*²

Inherent in such a collection of miscellaneous essays is much repetition and duplication. For example, the South West Africa case is discussed for fifty pages

1 392 F.2d 706 (5th Cir. 1968), cert. den., 393 U.S. 924 (1968).

2 23 N.Y.2d 46, 242 N.E.2d 704 (1968).

in Chapter V and again for nearly thirty pages in Chapter XII. Further, this form of book leads to bad editing. When *Sabbatino* is referred to in footnotes to pages 55 and 526, the only cross-reference is to a 1965 book on the case, ignoring the fact that the whole of Chapter XIII discusses the litigation and brings it up to at least March, 1968.

Most importantly, the reader who may be interested in discovering the central theme of Professor Falk's theory of international law will find no clear development. He is remitted to searching for clues in the 250,000 words of the book and piecing them together himself, if he can, into a whole. This is made even more difficult by the inclusion of a number of very good essays (of obvious interest to Professor Falk and perhaps also to some readers) which have little apparent connection with the ostensible purpose of the book. They served only to divert this reviewer from his search for the central theme.

Illustrative are the essays entitled "The Authority of the United Nations to Control Nonmembers"; "An Explanation of the Extraterritorial Extension of American Antitrust Regulation"; "Some Notes on the Consequences of Revolutionary Activity for the Quality of International Order"; and "Observations of Political Loyalty at a Time of World Crisis."

Finally, the dedication "On behalf of the people of Vietnam (and elsewhere) who have been victims of *Pax Americana*" is a curious opening to a philosophical study of international law, the opposing theories of its nature and thoughtful approaches to its future.

In discussing Kenneth Carlston's "Law and Organization," Professor Falk says that "this book is very nearly required reading for anyone concerned with the study of world order" but that Carlston is not "easy" to read. Both the compliment and the criticism are apt in this review.

In several of the essays Professor Falk speaks of the need for an "adequate theory of international law." As noted above, his starting point is the consideration of the present theories of Kelsen and McDougal.

Although the index (which is excellent) cites Kelsen at 17 places and cites McDougal at 47 places, the principal comparison of their views will be found in Chapter II. Very curiously, a lengthy and useful essay entitled "Some Thoughts on the Jurisprudence of Myres S. McDougal" is not part of the main text, but is relegated to the Appendix, without explanation.

In Chapter II, Professor Falk contrasts Kelsen's view of international law as an impartial "restraint system" and an "autonomous reality" with McDougal's view of international law as an "open system" in which the decision-maker balances national interests against world community interests. He criticizes Kelsen's views as "obsolete" since they ignore the "actualities of statecraft" and "political realities." He criticizes McDougal's views as transforming international law into "a cold war ideology," vindicating the West and condemning the Communist world, and as engaging "unashamedly in exercises of national self-justification." He identifies Kelsen's system as "generating relatively clear criteria to assess legality" and McDougal's system as "too complex and too vague to provide guidance."

Also, in the realm of theory are three excellent critical essays (Chapters

XVI to XVIII) on the work of Wolfgang Friedmann, Morton A. Kaplan and Nicholas deB. Katzenbach, and Kenneth S. Carlston.

What can we glean, from a careful reading, about Professor Falk's own concept of the fundamentals of such an "adequate theory of international law"?

With some temerity, this reviewer suggests the following.

International law has a double function: (1) as an intellectual discipline devoted to the study of order in international affairs and (2) as an operative code of conduct exerting influence on international life.

International law must include "the living needs of international society for certain requisites of order, fairness and restraint." It must promote social values in terms of human dignity, and must clarify common standards of self-restraint.

International law is founded upon a decentralized, horizontal system of sovereign nation-states, with no supranational authority and no technique of third-party procedures for the settlement of disputes. Every nation-state may manipulate international law as a propaganda instrument to rationalize and support its national policy goals. He criticizes international lawyers for becoming advocates for national policies, quoting Giraudoux's brilliant "Tiger at the Gates."

Drawing analogies to the domestic legal system, with its elaborate court system to enforce the "rule of law," is fallacious. No nation-state will trust a supranational third party to decide any matter which it considers "vital" to its "national power, wealth or prestige"; and will usually refuse to submit any matter to third-party adjudication, unless it knows in advance what the decision will be. Further, decisions of the World Court will not be obeyed "if these pronouncements collide with basic policies of important states." In the light of United States practice, our support of the "rule of law" is entirely cynical.

International law cannot prevent the use of force by one nation-state against another. This does not, however, make it useless in the area of war and peace. The rules of international law can reduce the risk of war and can temper its magnitude. They can set up minimum standards of behavior to confine conflict within reasonable limits. Also, the felt need to secure external support for a position may lead a nation-state to use the "rhetoric" of international law to sustain its position as "legal," and this debate on "legality" will exercise a brake on conflict.

International law, however, has important uses other than war and peace. It facilitates cooperative undertakings as in telecommunications, banking, health, postal delivery, artistic property, etc. These functional cooperations may influence national behavior in the area of war and peace.

International law must take into account both global and domestic interests. It is the duty of every nation-state to advance the values and interests of the overall world community, and not merely the values and interests of the national actor. Further, it must recognize the existence of "regional" interests, and should operate on a multilevel basis, i.e., national, regional, bloc and global interests.

This requires national governments to act reasonably, giving thought to the rights of others since uniform international standards may be so beneficial that they will overcome the desire for national freedom of action. This is a sort of

"golden rule" of conduct in the international field. As Professor Falk puts it, in his discussion of outer space, ". . . a powerful state in the contemporary world is well advised to act to improve world order as well as to promote its own sovereign advantage."

Black and white distinctions between "legal" and "illegal" conduct by nation-states are fallacious. The true question is the "degree" of violations of the rules. "Civil disobedience" of international law must be admitted and permitted under particular circumstances, and the limits must be specified in advance.

In the discussion of the sources of international law, Professor Falk contends that "customary" international law can be created by the unilateral repetition, by important states, of practices which are not objected to by other states. He argues against reliance on the theory of consent, through the treaty method, since this leads to minimum agreement on standards of the least common denominator. Instead, he argues forcefully in favor of the theory of "concensus."

Here he runs into considerable difficulty, since he recognizes the need for "overwhelming majority" and "virtual unanimity." He searches for this primarily in the "law creating processes" of acts and resolutions of the U.N. and other international institutions.³ Here he is forced into a support for the quasi-legislative competence of the General Assembly to state the concensus and create binding rules of international law, while conceding at the same time that such a concept was decisively rejected at San Francisco. Further he recognizes that the growth of law must be "conjoined with the distribution of effective power" but does not clarify what grouping of the 127 equal votes in the U.N. General Assembly will suffice to create the "overwhelming majority" and the "virtual unanimity" required.

On the problem of the enforcement of international law more stress should be placed on the building up of national enforcement, particularly by national courts, rather than on the creation of international enforcement authorities. He deplors that part of the *Sabbatino* opinion which supported the court's deference to the executive and thereby reduced the competence of the court in the field.

Professor Falk argues that supranationalism and a limited world government are urgent and agrees that there can be no true "law" without government. He considers the chances of success as nil, except as the aftermath of a nuclear war or an international agreement on a system of shared values. He categorizes the search of Western lawyers for a strong third-party adjudicatory system, imitating the domestic law system, as "naïve," as "innocence" and as a "legalistic fallacy." He does, however, admire the work of Clark and Sohn, as a base on which to write a possible history of the future.

One great problem in trying to invent a précis of Professor Falk's theory is how to reconcile apparent inconsistent statements.

Alongside strong support for international institutions as a source of international law, and particularly the resolutions of the "consensus" of the U.N. General Assembly, the reader will find a flat statement that national decision-making is the focus for inquiry, not the international central institutions.

Alongside strong support for international law as a restraining influence upon

3 See PROCEEDINGS 1970 ANNUAL MEETING AM. SOC. INT. LAW, pp. 46-63.

nation-states, the reader will find a flat statement that "civil disobedience" of international law must be admitted and permitted.

Alongside the thesis that the "vindication" of law is to promote social values in terms of human dignity, the reader will find a flat statement that the exercise of force in accord with community expectations is a "fulfillment" of international law.

Alongside several hundred pages of analysis of international law and its functions, the reader will find a flat statement that the function of international law is to "establish a system for continuous communication despite the hostility of adversaries." Is this all? What is the difference between this and conventional diplomacy?

Alongside urging the maximum use of the judiciary in matters involving international law, including a plea that courts rule on their own country's violation of international law,⁴ the reader will find a flat statement that the focus should be on the political official and not on the judicial decision-maker.

One final point Professor Falk argues throughout that the basis of obligation in international law must be more "sociologically grounded." But whose sociology? What sociological sources? No answer is given.

It would be unfair to limit this review to the obvious flaws in this work. The individual essays are interesting and valuable. They will be of real value to teachers, to students, to lawyers and to political scientists as source material on the individual topics mentioned. Professor Falk's research is profound, his comments are perceptive and he covers a wide area of international activities.

In Stanley Hoffman's review⁵ of Professor Falk's prior collection of essays, *Legal Order in a Violent World*, he expressed his hope "for a systematic treatise" from Professor Falk's hand. This book is not that treatise. We may hope that someday Professor Falk will accept the challenge and give us a unitary, detailed, comprehensive statement of his theory and philosophy of international law.

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⁴ Cf. *Massachusetts v. Laird*, 400 U.S. 886 (1970).

⁵ 64 AM. JOUR. INT. LAW 720 (1970).

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BOOKS RECEIVED

- THE AMERICAN JURY.** By Harry Kalven, Jr. and Hans Zeisel. The report of the University of Chicago Law School jury study. The report draws from 3576 jury trials from all over the United States. Chicago: The University of Chicago Press. 1971. Pp. xix, 559. \$5.95 (paperbound).
- THE APPORTIONMENT CASES.** By Richard C. Cortner. A study of the strategy, tactics, and procedures of constitutional litigation as they developed in the two principal apportionment cases: *Baker v. Carr* and *Reynolds v. Sims*. A treatment useful both to students and practitioners. Knoxville: University of Tennessee Press. 1971. Pp. ix, 283. \$10.95.
- THE ARBITRATION OF INDUSTRIAL ENGINEERING DISPUTES.** By Ronald L. Wiggins. A publication which will be of primary value to those practitioners involved in the labor arbitration process and who are increasingly confronted with technical disputes involving piecework, job evaluation, incentive and workload problems. Washington, D.C.: Bureau of National Affairs. 1970. Pp. xiii, 350. \$12.50.
- COMPETITION & PUBLIC POLICY—CASES IN ANTITRUST.** By H. Lee Fusilier and Jerome C. Darnell. A collection and explanation of the most significant court decisions in the field of trade regulation. Englewood Cliffs, N.J.: Prentice-Hall, Inc. 1971. Pp. xi, 404. \$6.95 (paperbound).
- CRIME AND BUSINESS.** Edited by Michael Gartner. Stories which have appeared in the Wall Street Journal between early 1968 and late 1970. Princeton: Dow Jones Books. 1971. Pp. 216. \$1.95 (paperbound).
- CRIMINAL EVIDENCE FOR POLICE.** By Paul B. Weston and Kenneth M. Wells. A functional analysis of evidence and its use oriented to the day-to-day needs of police officers and criminal investigators. Englewood Cliffs, N.J.: Prentice-Hall, Inc. 1971. Pp. 246. \$8.95.
- ECONOMIC THEORY AND THE ANTITRUST DILEMMA.** By Peter Asch. A book heavy with economic theory which unconsciously demonstrates, if nothing else, why it is so difficult for lawyers and economists to talk to each other. New York: John Wiley & Sons, Inc. 1970. Pp. x, 414. \$9.95.
- THE ENVIRONMENTAL LAW HANDBOOK.** By Norman J. Landau and Paul D. Rheingold. A guide for lawyers and laymen as to the legal remedies for the protection of the environment. New York: Ballantine & Co. 1971. Pp. 496. \$1.25 (paperbound).
- THE HUMAN RIGHT TO INDIVIDUAL FREEDOM: A SYMPOSIUM ON WORLD HABEAS CORPUS.** Edited by Louis Kutner. A fascinating collection of essays

by jurists throughout the world dealing with attempts to eliminate the arbitrary detention of human beings through the establishment of the World Court of Habeas Corpus. Coral Gables: University of Miami Press, 1970. Pp. 249. \$12.50.

THE INTERNATIONAL LAW OF COMMUNICATIONS. Edited by Edward McWhinney. A collection of essays on the law of international communications. Dobbs Ferry, N.Y.: Oceana Publications, Inc. 1971. Pp. 170. \$7.10.

JUSTICE DENIED. By Leonard Downie, Jr. A call for reform of the present court system in the United States. New York: Praeger Publications. 1971. Pp. 224. \$6.95.

JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT. By Gerald T. Dunne. A history of the influence of Justice Joseph Story on American law and life. New York: Simon and Schuster. 1971. Pp. 458. \$12.95.

LAW AND THE CHANGING ENVIRONMENT. By Leland Hazard. The history and processes of the law with emphasis on significant court decisions. San Francisco: Holden-Day, Inc. 1971. Pp. xxv, 454. \$11.95.

THE LAW OF DISSENT AND RIOTS. Edited by M. Cherif Bassiouni. A collection of essays on the issue of what response the law should make to the contemporary problems of dissent, civil disobedience and civil disorder. Most of the articles are reprinted from other sources and range in quality from excellent to disappointingly mediocre. Springfield: C. C. Thomas, Publisher. 1971. Pp. xii, 498. \$24.75.

THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES. By J. G. Bellamy. An analysis of the early English law of treason and the part it played in the development of law and political thought. London: Cambridge University Press. 1970. Pp. xvii, 266. \$14.50.

LEGAL LIMITS ON THE USE OF CHEMICAL AND BIOLOGICAL WEAPONS. By Ann Van Wynen Thomas & A. J. Thomas, Jr. The authors focus upon the nature of chemical and biological weapons, and chronicle the attempts to halt their use. The conclusion is that the law is far from the point of absolute prohibition of these devices. Dallas: Southern Methodist University Press. 1970. Pp. x, 332. \$10.00.

THE LIBER AUGUSTALIS. Translated by James M. Powell. The constitutions of Melfi promulgated by the Emperor Frederick II for the Kingdom of Sicily in 1231. Syracuse, N.Y.: Syracuse University Press. 1971. Pp. xxxviii, 163. \$8.00.

- MR. JUSTICE FRANKFURTER AND THE CONSTITUTION. By Philip B. Kurland. An analysis of the decisions of Justice Frankfurter and their impact on the law. Chicago: University of Chicago Press. 1971. Pp. x, 235. \$10.50.
- ONE LIFE-ONE PHYSICIAN: AN INQUIRY INTO THE MEDICAL PROFESSION'S PERFORMANCE IN SELF-REGULATION. By Robert S. McCleery, M.D., Project Director. A Ralph Nader Study Group report which, even if somewhat hastily compiled, nevertheless presents some interesting insights with respect to the growing crisis in medical care. Washington, D.C.: Public Affairs Press. 1971. Pp. iv, 167. \$5.00.
- A PRIMER ON THE LAW OF DECEPTIVE PRACTICES. By Earl W. Kinter. A valuable compendium of those business activities which are deemed to be deceptive practices. The author achieves the near impossible task of adequately treating his subject without the use of so much as one footnote—an accomplishment which will be cheered by students and practitioners alike. New York: The Macmillan Company. 1971. Pp. xiii, 593. \$10.95.
- READY FOR THE DEFENSE. By Martin Garbus. An account of the highlights of the author's legal career. New York: Farrar, Straus and Giroux. 1971. Pp. xiii, 306. \$7.95.
- RIDING THE PENNSY TO RUIN. Edited by Michael Gartner. A Wall Street Journal chronicle of the Penn Central problems. Princeton, N.J.: Dow Jones Books. 1971. Pp. 90. \$1.95.
- THE SCHOOL PRAYER DECISIONS. By Kenneth M. Dolbeare and Phillip E. Hammond. A study of the court decisions and local policy with respect to prayer in public schools. Chicago: University of Chicago Press. 1971. Pp. xi, 164. \$6.50.
- SUPREME COURTS IN STATE POLITICS. By Henry R. Glick. An investigation of the judicial role in the state political system. New York: Basic Books. 1971. Pp. xvi, 166. \$6.95.
- TOWARD A RATIONAL POWER POLICY. By Neil Fabricant and Robert M. Hallman. A report by the Environmental Protection Administration of the City of New York on energy radiation. New York: George Braziller, Inc. 1971. Pp. vi, 292. \$3.95 (paperbound).
- WILLIS ON PARTNERSHIP TAXATION. By Arthur B. Willis. A textbook on the aspects of partnership taxation. New York: McGraw-Hill. 1971. Pp. xxx, 764. (Price unreported.)

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