

1981

## Some Thoughts on the Decline of International Law and Future Prospects

Richard Falk

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Falk, Richard (1981) "Some Thoughts on the Decline of International Law and Future Prospects," *Hofstra Law Review*: Vol. 9: Iss. 2, Article 4.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol9/iss2/4>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact [lawcls@hofstra.edu](mailto:lawcls@hofstra.edu).

## SOME THOUGHTS ON THE DECLINE OF INTERNATIONAL LAW AND FUTURE PROSPECTS

*Richard Falk\**

For those who have believed that international law and the United Nations could contribute to an ever-strengthening prospect of benign world order, it is especially necessary to be tough-minded at this time about the limitations of law and international organization. We are at one of the weakest points of our century in coming to terms with the fundamental challenges in international life. This is not the moment to celebrate the achievements of international law. It is a time to acknowledge that the relevance of international law is declining with respect to the great world-order issues of the day. This bleak assessment is bleaker still when it is acknowledged that international law has never been a truly effective force in relation to these issues. So decline represents regression from "weak" to "weaker."

\* \* \*

In September 1980, we witnessed for the first time since World War I an example of one country attacking another—Iraq attacking Iran—while the world looked on with indifference. Both superpowers have suggested that this is a context where noninvolvement is the appropriate response. Nor has a dissident voice of any significance been raised in the United Nations or elsewhere in international society. To me, this represents a monumental, unacknowledged retreat from the post-World War I notion that aggression is the most severe form of disruption of international life and that the appropriate response to aggression is not indifference and noninvolvement. At Nuremberg and Tokyo, individuals were executed because they engaged in crimes against the peace. The

---

\* Albert G. Milbank Professor of International Law and Practice, Princeton University. These thoughts were originally conceived for an address delivered at the Annual Conference of the Canadian Council of International Law and the United Nations Association in Ottawa, Ontario on Oct. 25, 1980.

Nuremberg Judgment itself declared that the planned waging of an aggressive war is the most severe crime of all, encompassing all other crimes.<sup>1</sup>

Admittedly, there are opportunistic reasons for what I call a normative relapse in the Iraq-Iran situation. Ayatollah Khomeini is unpopular with the governments of both the Western and Eastern worlds. But if we say that an unpopular government or political process is fair game for those who would use force to alter the political status quo, then we reestablish war as a legitimate instrument of foreign policy and abandon the normative effort of this century to oppose aggression under all circumstances. Compare 1956, for instance, when Britain and France, the closest allies of the United States, invaded Nasser's Egypt. Egypt was very unpopular in the West at that time, since it had recently nationalized the Suez Canal and established positive contacts with the Soviet Union. Despite all that, the tradition of opposing aggression was then so strong that the United States at least took a position on the side of Egypt and supported restoring the territorial status quo. The significance of the Iraq-Iran War is not only international society's failure to oppose a well-recognized case of aggression, but that this stance is opening the way for what will be the worst feature of the emerging decade—the prospect of resource warfare. More fundamental than distaste for Khomeini and his Islamic Revolution is the conviction in Washington and elsewhere in the West that the only way to preserve Western preeminence and prosperity is by reacquiring the freedom to use force in controlling Persian Gulf oil and possibly African mineral wealth. Not only does this represent a normative relapse, but it is exceedingly dangerous from a pragmatic point of view. Discussions concerning the establishment and mission of the rapid-deployment force—a mobile strike force for Western interventionary diplomacy in the Middle East—have been oblivious to international law's constraints and have lacked acceptance of accountability to international society or the United Nations for use of force. Since it has been accepted that the danger to Western interests in the Persian Gulf arises more from internal developments within the region than from external threats, even the color of a legal justification is nullified.

---

1. 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 186 (1947).

This analysis suggests two things: First, there is a perceived right of intervention to avoid the outcome of national revolutions that are likely to occur in a region where many of the governments are isolated from their own people, retaining power by relying on repressive force. It is extraordinary that the United States has not learned that you cannot smash a national revolution with superior military power. One would have hoped that this was the Vietnam War's primary lesson, a lesson reinforced by the fall of the Shah in Iran. Most students of the Iranian experience conclude that the Shah was overarmed and that excessive arms failed to bolster his security. Yet, the first reaction to the Shah's fall was to send Secretary of Defense Harold Brown to other Persian Gulf countries with an offer of additional military equipment, as if to suggest that the Shah's collapse occurred because he was underarmed.

Second, a fundamental political question is in the background: Why do smart people keep making stupid policies? Despite its rhetorical tone, this is not a trivial question. I assume that smart people are making these policies and that they are loyal in the conventional sense of the term. This is not a matter of subversion at the highest level of empire; American policymakers are sincere in their efforts to protect national and Western interests. Yet, these leaders persist in doing things that do not work. We understand about natural phenomena that have undesirable effects, but are uncontrollable. We understand that a volcano like Mt. St. Helens erupts and that one gets out of its way to avoid harm. We do not yet understand that a national revolution is a political analogue to a volcano, a human eruption of discontent that cannot be controlled by external military power. There was a time when a detachment of Marines sent into a country in the Western hemisphere was successful in reestablishing the domestic structure of domination. A distinctive feature of recent history, however, is the process of decolonialization and the struggle against control of the world's economic, cultural, and political destiny by Western civilizations. That struggle is still going on. The drive toward self-determination is a powerful, inexorable force. The effort to smash it by military means has the adverse consequence of killing many people and undermining the self-esteem of the intervening power, therefore calling into question its basic moral and political character. But, it does not reverse the historical process. You cannot quiet political volcanoes any more than you can quiet Mt. St. Helens.

Not only is the United States engaged in such an effort in the Third World, but its rival superpower is comparably engaged in an equivalent mission in Afghanistan. With what seems to be a ten-year lag between what happens in Washington and what happens in Moscow, there is now direct Soviet military intervention in a Third World struggle for self-determination in Afghanistan with depressing repetition of the same indiscriminate-killing tactics that were used by the United States in Vietnam. Both great constellations of military power perceive themselves in a position of decline in the world, less able to control what is for them an adverse historical process. For the Soviet Union, the reversal of China's relationship to the West from one of antagonism to one of virtual alliance is an extraordinary loss of Soviet power and position. This geopolitical defeat probably provides a large part of the explanation for recent increases in Soviet military efforts.

Imperial powers finding themselves losing their external control while retaining military prowess have always been exceedingly dangerous. This current instance of joint imperial decline occurs at a time when weapons of mass destruction are becoming increasingly routine instruments of statecraft. Returning to the concreteness of the Persian Gulf region, it is well understood that the rapid-deployment force is a nuclear trip wire. It is much too small to deal with either a significant internal threat in one of the region's countries or with a determined Soviet challenge. What the so-called Carter doctrine really involves is a reversion to the Dulles era of massive retaliation. The new nuclear policy is represented by the recently announced Presidential Directive No. 59, which alters the status of nuclear-weapons doctrine and makes it clear to the public for the first time that the so-called flexible targeting approach will govern foreign policy regarding the defense of vital interests. We can expect further movement in this direction from the Reagan-Haig foreign policy.

Not only do we have the phenomenon of the West, particularly the United States, trying to destroy the process of national revolutions by military means, but for the first time this has become enmeshed with a rivalry between the superpowers for oil, the most critical resource in the world. We do not know the extent of Soviet dependency in the future on oil imports. There are studies indicating that the Soviet Union will be dependent on imported oil by the middle of the 1980's. To the extent that such projections are correct, they suggest a powerful Soviet interest in maintaining

at least an open door to the Persian Gulf. If the West insists on control and the Soviet Union insists on an open door, we have the ingredients for general warfare with weapons systems that are increasingly unstable and doctrines that are growing less sensitive to avoiding nuclear holocaust.

These developments exist against a general political background of domestic problems that neither the Soviet Union nor the United States is able to confront or solve. The exaggeration of the external challenge by the leadership of both nations results in part from an inability to achieve a domestic economic policy that can deal with the pressures and contradictions of slow growth. Americans do not have the tools to deal with unemployment and inflation in a context of increasing production costs arising from more expensive energy and more burdensome environmental regulations. We do not know how to deal with these problems, but we lack the political courage and vitality to acknowledge our ignorance. Therefore, one encounters the process of hyper-consensus emerging, an excessive consensus on what the danger is. The recent Presidential debate in the United States highlighted a controversy as to whether the defense budget should be increased by 5% or by some higher increment. This is merely a narrow tactical dispute within a larger militaristic consensus. The implications are alarming—both for democracy and for our capacity to deal constructively with the internal and international challenges that face the country.

The diagnosis adds up to the fact that the Western powers, as well as the Soviet Union, are pursuing self-destructive policies that are also exceedingly dangerous to others. In addition, both countries are beset by internal contradictions that their leaders do not know how to overcome and are unable to confront. This is the essential overriding circumstance that confronts us as we enter the 1980's. In facing this circumstance, it is important to acknowledge how serious the situation is and how addicted we are to false solutions and wrong understanding—the opposite of what the Buddhists call right understanding. The consequences of our wrong understanding are likely to be exceedingly grave. There is a joke that is popular in Moscow. It consists of a conversation between Ivan and Ilya which goes as follows: Ivan says, "What will you do when the nuclear alert comes?" And Ilya says, "Well, I will wrap myself in a sheet and walk slowly to the nearest cemetery." Ivan says, "Why slowly?" Ilya replies, "Well, not to cause panic, of course."

Many of our political, intellectual, and human mechanisms these days are designed to avoid panic—in ourselves and others. This kind of civilizational escapism is one symptom of the situation. We now know that in dealing with drug addicts or alcoholics, the first step in a cure is to get such individuals to grasp firmly their identity as addicts or alcoholics. Until they have acknowledged such an identity and really feel it, there is no prospect for change because there is resistance to the reality that is involved in change. In my view, a true assessment, or as accurate an assessment as possible, is the only hope for world change and therefore is, in a sense, a commitment to hope. If we are truly hopeless, feeling trapped, paralyzed, numb, then of course there will be no willingness or capacity to confront uncomfortable realities. Those who go through life as addicts of one sort or another, successfully insulate themselves from their own identity. They do not see themselves as others see them, in the way that they are in some objective sense. When it comes to geopolitics, which hide in the abstractions of state power and foreign policy, the problems of detecting destructive addiction are particularly acute. Centuries of ideological conditioning keep us from recognizing and dealing with our situation. We have gotten away with escapism for a very long time. However, we now live in a period when we are no longer able to get away with it, and when understanding the future is nothing more than a sensitive interpretation of the implications of the past and present.

The Chinese have a proverb that goes: There is nothing more difficult to predict than the future. While we cannot know the future in an exact way, we can try to suggest as honestly as possible the likely consequences of the present. In this world of change and ferment, there is the possibility of achieving an understanding that is more constructive in coping with the historical trends that challenge us and in responding to them. The old ways are not working and the sooner we can allow ourselves to acknowledge this reality, the better the chances are that we can do something positive about it.

The efforts in this century to deal with international society's problems have concentrated on four broad areas that exhibit both the potential and limits of international law and international institutions. The area of greatest success has been in what I call the management of complexity. There has been a surprisingly resilient capacity on the part of sovereign states, governments, and nongovernmental actors to contrive mutually beneficial ways of dealing with the implications of interdependence.

The second area of effort, one where there has been less success, is the containment of conflict within tolerable limits. A major aspect of the containment effort has been an attempt to build procedures and a worldwide consensus prohibiting aggressive uses of force. The failure to abandon aggressive force altogether represents a very serious deterioration in the quality of international order.

The third major area is of relatively recent origin. I call it the promotion of decency in the world. Its most important form is the notion that poverty and mass misery are not matters of only domestic concern, but are also matters that affect the quality of international life as a whole, present and future. This notion acknowledges our identity as a single species and recognizes that the human interest emerging alongside national or regional interests is not just sentimental. To the extent that we neglect this human interest, we are at this time risking moral as well as physical extinction. We are more or less alert to the physical threats arising from ecological pressures and the possibility of nuclear war. However, we are much less alert to and much less concerned with the moral threat posed by a world that has zones of privilege and zones of misery and yet is an integrated world in which our spiritual heritage and moral teachings suggest that unity is more fundamental than separation. Unless we honor that heritage, we risk a drastic foreshortening of our own potential.

This danger is compounded by a security system that presupposes a willingness to engage in the extermination of innocent populations. I think there is a moral cost attached to nuclear deterrence, even if it works, that hides behind the consoling and seemingly rational language of strategic doctrine. The willingness to even threaten the destruction of civilization for the sake of secular political ends is repugnant to our religious teaching. It involves idolatry of the secular state. The assumption that the state can engage in unconditional destruction for the sake of its conditional ends is profoundly irreligious. This civilizational plight is a failure of religious institutions and of the religious sensibility to offer any critique of the exercise of political power and its concentration in the sovereign state.

Another side of the problem involving the promotion of decency in relation to equity and development is the "whole" question of human rights. To the degree that we tolerate torture, mass killing, and extreme repression, and to the extent that we not only tolerate such abuses but reinforce them by the kinds of foreign policies that are pursued, we deny our own dignity and esteem and

condone a process that is exceedingly destructive in its consequences. In this area we see the relative impotence of formal authoritative structures to achieve desirable change and the relative potency of informal nongovernmental action to exert significant pressure. It is primarily the world's dissidents, the resistance movements, and the human rights actors, especially those independent of state power, that are creating possibilities for change and the basis for hope, and not the codes that are drawn up by governments and ritually endorsed by international institutions. Legal instruments are all very well as background, but the foreground is the struggle of real people against real structures of domination and oppression. The future of human rights is the future of those struggles.

The fourth general area of international effort relates to avoiding the catastrophe of nuclear war. Here, we encounter a colossal failure on the part of international law and the organized international community. The degree to which nuclear weapons have been accepted without being subjected to serious scrutiny from even an academic viewpoint suggests an astonishing complacency within professional circles. Weapons of mass destruction overwhelm the traditional law of war, and yet one can find few law-journal articles or serious academic treatments of these issues. The fundamental challenge is one of political will to achieve restraint. Such restraint is absent in the centers of power, illustrating the ineffectiveness of moral and legal reasoning. The gap between the normative and the practical is something we need to grasp and interpret in an honest way. It is far better to take account of this distance, than pretend it does not exist.

We also have to take note of the practical failures of the existing logic. These failures are producing an arms race that is diverting resources from needy people throughout the world and from efforts to protect our environment against destructive tendencies. A large proportion of the best scientists and engineers continue to work in military domains. In the United States, one of the consequences of this diversion of brainpower is the reduced productivity of American industry relative to Japanese and German productivity. This relative decline is in part a reflection of the fact that Japan and Germany are not quite as locked into the war system. They had the good fortune in this respect to lose the last big war, and therefore have been forced to devote themselves to things that are more constructive and more sustaining to them.

The self-serving reliance by the powerful on the nonproliferation treaty<sup>2</sup> as an answer to the hazards of nuclear war is a false solution unless combined with denuclearization and nuclear disarmament. You cannot create two worlds—one of countries that rely on nuclear weapons for their security and continue to innovate new weapons while telling others with security problems that they cannot have them, and one of countries that have unconditionally denied themselves access to such weapons. Why should other states not follow the example of those that are most powerful and successful in this world system? If nuclear weapons are acceptable for the Soviet Union and the United States, they are acceptable for Israel, Uganda, and others. To fool ourselves that such a calculus does not apply to nuclear weapons achieves nothing as far as a sound international order is concerned. It is increasingly useless to discuss nuclear policy in the Third World if one continues to think of a dual order of nuclear and non-nuclear states as being a “given” of the post-colonial imperial era. Anti-proliferation policy is perceived by most of the Third World as an illegitimate aspect of the sovereign-state system because it is antithetical to the notion of state equality and sovereign equality. I think there has been a real failure, even on the analytical level, respecting the avoidance of nuclear-war catastrophe within the world system.

\* \* \*

In contemplating the future,<sup>3</sup> there are three basic directions that are useful to explore. The first way to approach the objective setting is to say we must work out an international order that is consistent with the state system since it is the only order we have. The logic of the state system is the logic of territorial actors that do not trust each other, that are in competition and are struggling to maintain their security by being strong. To the extent one adopts this logic, one must be wary of things like human rights and the United Nations because they are inconsistent with the management of short-term nationalistic concerns that preoccupy state leaders. Promoting human rights is inherently interventionary, and intervention is incompatible with the smooth working of the state system. There is a tension between the two which is usually unac-

---

2. Treaty on the Non-Proliferation of Nuclear Weapons, [1968] 21 U.S.T. 483, T.I.A.S. No. 6839.

3. See generally Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 YALE L.J. 969 (1975).

knowledge, but exists on a very real level. Similarly, disarmament is a silly thing to work toward in a system of distrust and competitive pursuit of security and strength. Yet, there is something to the idea that trying to make the state system work in accordance with its own logic is preferable to an innocuous supranationalism. It is necessary to understand that we are living primarily in a state system in which power is currently distributed and concentrated. This system has a certain logic related to its persistence. It is useful, therefore, to moderate the operation of this logic. Such an orientation would lead us, for instance, to a better understanding of why the nonproliferation treaty does not work in such an order.

The second and still conventional view of the general situation suggests that we are in a period of what I call evolutionary statism. We are trying to adapt the state system's operation to meet developments on other levels of social organization. In this second view, it is a needless simplification to reduce everything to the logic of the state system when actors like international financial institutions, the World Bank and International Monetary Fund, the United Nations, and multinational corporations are creating a world different from the classical state system. A new world order is emerging which is more complicated and has several ordering logics that are simultaneously operative. When taken together, this system provides instruments for meeting some of the challenges that threaten the quality of international life—both its sustainability and capacity to deal with human issues. This kind of evolutionary statism has been the sustaining force of the liberal idealism existing since the formation of the League of Nations. You cannot get rid of the state, but you can mitigate its worst features with other kinds of developments and institutions. In time, the total mix of these reforms will produce a genuinely new reality.

The third view assumes that we are at a Grotian moment. That is, we are at a time when an old system of world order is unable to deal successfully with the challenges being posed to it, as feudalism and medievalism were unable to deal with the problems of Europe from the fourteenth to the seventeenth centuries. A new kind of order is trying to emerge, and the seizing of the Grotian moment, so to speak, is a matter of synthesizing the old that is dying with the new that is emerging in a way that goes beyond evolutionary statism and results in the formation of a political community and a political framework which is planetary in scope and directly responsive to the human interest. This does not mean that

such a transformation will occur in the 1980's or the 1990's, but that the positive direction of development is toward a set of attitudes and values with a less materialistic, less territorialistic, and less militaristic view of what security is about. There can either be a breakdown or a breakthrough during the transition period. It will require great courage and strength to participate not merely as passive spectators in the fundamental destructive dynamic now unfolding.

I want to close with a basic observation about the new decade. It is obviously a time of hazard. But, if one looks carefully, it is also a time of great opportunity and hope because the severity of the failures that are now cumulating gives world society the possibility of moving in new directions. With regard to international law, I propose that we take seriously aspirations for a more decent and humane world. These aspirations are not merely pious pipedreams, but are grounded in our will to survive and evolve as a species. What my perspective reduces to is a plea that we believe our own normative analysis and begin to act as if it really matters.

