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IN a certain sense, the Vietnam conflict testifies to the viability of international law. Both those who defend the United States involvement and those who oppose the intervention have seen fit to cast their arguments in juridical molds.[1] This has several desirable consequences. A reference to legal rules either as the justification of national action, or as a measure of national policy, is, arguably, some evidence of an emerging world order. No matter how the rules are applied, their very presence demonstrates the desire of all concerned to move international affairs from its disordered condition to a more stable governmental foundation.

Yet, the prevalence of juridical formulae is not an unlimited value. The Vietnam war is a very complex affair, and many of its aspects are not readily susceptible to legal analysis. Southeast Asia is an arena of international politics—a meeting place of cold war ideologies—as much as it is the locus of legally cognizable rights and duties. An excessively lawyer-like evaluation of the problem fails to bring to light the extra-legal motivations of national policy which have influenced the decision to intervene at least as much as have purely legal considerations.[2] The failure to account for these political factors, no matter how persuasive the legal analysis, means an equivalent inadequacy of comprehensive analysis.

One contribution to the Vietnam question in which this apolitical juridicism is particularly prevalent, is in the critique of Professor Falk of Princeton University. His thesis is a brilliant one, and by far the most original contribution to the vast body of literature devoted to this issue. Because of the breadth and erudition involved in his analysis, its radically juridical and apolitical character is liable to be missed by all but its most careful readers. Yet it is a point of view which any serious student of the Vietnam situation should understand.

THE FALKIAN THESIS

Professor Falk's critique of United States involvement in Vietnam is guided by his more general ideas of the role of law in the present decen-

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1. E.g., Deutsch, The Legality of the United States Position in Vietnam, 52 A.B.A.J. 436 (1966); Legality of United States Participation in the Viet Nam Conflict: A Symposium, 75 Yale L.J. 1084 (1966); Moore, International Law and the United States Role in Viet Nam: A Reply, 76 Yale L.J. 1051 (1967); Moore, Lawfulness of Military Assistance to the Republic of Viet-Nam, 61 Am. J. Int'l L. 1 (1967). See also Friedmann, Intervention, Civil War, and the Role of International Law, 59 Am. Soc. Int. Law Proc. 67 (1965).

2. See Alford, The Legality of American Military Involvement in Viet Nam: A Broader Perspective, 75 Yale L. J. 1109, 1117 (1966).

tralized international community. Keenly aware of the thermonuclear dangers posed by the cold war, Falk starts with a postulate of non-violence and builds upon it an elaborate structure of international rules whose purpose is to minimize the possibilities of armed conflict.[3] These ethico-juridical requirements of interstate peace are applied to the problem of international intervention in internal wars.[4]

Falk observes, very perceptibly, that national decision-makers contemplating intervention tend to characterize the conflict in a manner best calculated to justify their proposed course of action. For example, if foreign power A gives aid to insurgents engaged in conflict with incumbent government B; C, an adversary of A, and friendly towards incumbent B, feels free to characterize A's actions as "aggression"; which theoretically justifies a maximum response by C against the "aggressor" A. Through this unlimited discretion a civil war can become an international conflict. To restrain this unbridled power of characterization Falk constructs his juridical norms of non-violence.

The norms of interstate conduct are developed upon a three part model of internal wars. To each model there corresponds rules of conduct, required both by the ethic of non-violence and the necessity of mutual restraint in the present decentralized world.

The first type of strife refers to those instances where substantial and direct military force of one political entity is employed across the frontier of another. In such circumstances, of which the Korean war is illustrative, if prompt response is required, a defensive response, either individually or collectively is permissible.[5] The second model covers those cases of substantial military participation of a foreign power in a local revolution. Such a situation, as in the Spanish Civil War, carries great potentials of escalation; extensive intervention could very easily spill the conflict out beyond the borders of its origin. Here the restraints necessary to prevent expansion of the conflict necessitate a rule which would limit the participation of a second foreign state (after exhaustion of peaceful procedures) to a limited function—its use of an offsetting force, confined within the boundaries of the conflict.[6]

The final model covers those situations where there is an internal struggle for control of a national society with virtually no external par-

3. R. Falk, Law, Morality and War in the Contemporary World (1963) [hereinafter cited as Law, Morality and War].

4. Falk, International Law and the United States Role in the Viet Nam War, 75 Yale L.J. 1122 (1966) [hereinafter cited as Vietnam Critique].

5. Id. at 1126.

6. Id.

ticipation. In such circumstances, the discretionary power of states to intervene would be absolutely prohibited. Overall stability of world order would best be served by allowing the conflict to reach its own internal outcome.[7]

The official United States position is to characterize the Vietnam war as a Type I conflict: armed aggression by North Vietnamese military forces across the 17th parallel. By so characterizing the conflict, an optimum response, such as the bombing of the North, is officially justified.[8] Falk, on the contrary, believes that the war is really a Type III affair, a primarily local struggle for power which necessitates non-intervention. He will concede *arguendo* a Type II classification, thus restricting the national discretion to the use of force upon South Vietnamese territory.[9]

Falk's points are forcefully made, and their inexorable logic is extremely persuasive. It is a difficult thesis to criticize because of its symmetry, moral quality and obvious correspondence with the values which he deems critical: the minimization of violence and the development of rules of reciprocal restraint. Yet, in spite of its positive qualities, it fails to provide a satisfactory solution to the problem of intervention.

The primary weakness of the Falk theory is his determination to treat the problem exclusively at the plane of the external relations between states. The legality of intervention is evaluated strictly at the level of juridical abstraction;[10] political or ideological motivations of states are considered irrelevant to the functions of international law. But drawing a sharp dichotomy between law and politics gives the analysis an artificial character. Treating the problem in this manner necessarily excludes from consideration factors which are of substantial significance to the

7. Id.

8. Department of State, Office of the Legal Adviser, The Legality of United States Participation in the Defense of Viet Nam, 75 Yale L.J. 1085 (1966).

9. Vietnam Critique, supra note 4, at 1127.

10. Since the point of this article is to emphasize what the Falk thesis fails to consider, a direct evaluation of his juridical theory will not be undertaken. However, two observations are pertinent. First, legality of the use of force is more existentially grounded than Falk's thesis will allow. The test is one of reasonableness under all the circumstances, which might make licit a response across frontiers even if the strife does not fit strictly within the Type I model. Secondly, the theory, especially in Model III, assumes that international law has nothing to say about how changes in internal government shall occur. Exclusion of intervention leaves a vacuum to be filled by unbridled terror and subversion. Surely the world community has an interest in peaceful procedures of transition; the fact that the change occurs internally does not exclude the matter from international concern. Subsequent writings of Professor Falk on this topic reflect a greater appreciation of concrete factors. See Falk, International Law and the United States Role in Vietnam: A Response to Professor Moore, 76 Yale L.J. 1095 (1967).

states whose conduct he seeks to govern by rules. To consider the decision of the United States to intervene and support the Saigon Government as a simple exercise of national power grossly oversimplifies the purposes which direct the course of state decision-making. States are not merely integers in a power process; they seek to reflect in their international conduct the interests of the nations and people they represent. In other words, the state is something more than a judicial abstraction whose conduct can be meaningfully measured by purely external criteria. It is an agent for a political society of which it is a part.[11] And it is precisely this connection between national decision-making and politics that Falk strives to exclude from an evaluation of intervention by international legal norms. In doing so, he repeats an error of jurists for which there is considerable historical precedent.[12]

International Law and Politics

An adequate legal evaluation of intervention involves consideration of the political aspects of interstate relations as well as abstract juridical analysis. Yet how can international politics be incorporated into the legal order? The United States seeks to defend "freedom" in Vietnam; the National Liberation Front (Viet Cong) and the Ho Chi Minh regime seek to "liberate" the country. How can a system of law bring these vagaries of politics and ideology within the scope of legitimate juristic concern?

On the surface, the topic of international politics is a poor candidate for juridical thought. The history of foreign relations reveals the unpleasant truth that the interaction of states has been largely a struggle for power. This fact of interminable competition has been so prevalent that the concept of international politics is often defined in precisely those terms.[13] Its refractory character has made many believe that this level of interstate action is incapable of resolution in the quasi-ethical or normative discourse of legal science. The jurist shies away from this dimension of international life and concentrates upon the purely legal aspects of interstate relations. But before condemning the political realm

11. See J. Maritain, Man and the State 12 (1951).

12. De Visscher's comments about similar theories of international law are relevant. They were erroneous, he wrote, because they "evaded direct confrontation of international law with politics. At times [they] simply ignored the political, at others [they] attempted to eliminate it by artificially bringing even its most elementary data under legal criteria. The defects of such methods became increasingly marked as the profound upheavals in the life of the peoples forced the man of law to grasp realities more firmly. Law has everything to gain from dispelling by degrees 'the dangerous mystery surrounding the antithesis of the political and the legal.'" C. De Visscher, Theory and Reality in Public International Law 70 (1957).

13. See H. Morgenthau, Politics Among Nations 13 (4th ed. 1967).

as juristically unredeemable, it is profitable to examine whether the facts of force and power exhaust the content of this complex reality.

At the level of history, it is inaccurate to characterize international politics purely in terms of a struggle for domination. The great periods of Imperialism, e.g., the Roman conquest of Europe, the Spanish explorations, the era of British colonization, were all, in an important sense, expansions of state power beyond national borders for a primary objective of domination. But to fix the adventures at the level of power ignores many important aspects of the total historical picture. When the Roman legions receded, there remained with the exploited territories a deposit of laws and language of immense cultural value.[14] The same observation is true of most similar ventures by other powers. The point is not to condone aggression, but to point to the positive aspects of the interactions between states, qualities which elude a definition of interstate politics which does not rise above the index of power. By emphasizing the cultural values that emerge, it is possible to infer that the state interaction is not totally foreign to the value processes which the legal order is commissioned to develop. These significant external factors bear some relationship to the internal motivations of the acting states.

To these cultural facts there corresponds the conviction of states that it is their mission to transmit moral values which have developed within the nation it represents. Expansion of national virtue is the residue of imperialism as seen from the perspective of the acting state. In our age, this missionary zeal has taken on new force. From specific values grounded in national spirit the state has become the herald of general theories of human existence which, while transcending national foundations, it nonetheless is the task of favored states to proclaim. This is the age of ideologies; the effort to transmit a universal view of life beyond national borders. The frictions which it generates are euphemistically termed the "cold war."[15]

Thus, in some measure, the history of international politics is not explicable solely in terms of an interminable struggle for domination. Beneath the violent facts of competitive strife there lies some effort or tendencies towards meaningful transmission of human values. Yet they are inherently unstable. Even where ideology has an arguably generic source, its expression and interpretation is too closely bound up with the particular interests and failings of the states which proclaim its message.[16] This is as true of American exportation of democracy as it is of North Vietnamese, Chinese or Russian thoughts on "national liberation."

14. See generally A. Toynbee, A Study of History (2d ed. 1962).

15. C. De Visscher, supra note 12, 71-87.

16. There is an incisive demonstration of these weaknesses in E. Carr, The Twenty Years' Crisis, 1919-1939 (2d ed. 1946).

Yet, given the decentralized structure of international society, the effort to introduce ideological interests into civil strife is bound to continue beyond the current Vietnam crisis. It is a prime political fact, one that cannot be wished away by purely juridical attempts at international stability. Juridical critique is indispensible, but it must be accompanied by an attempt to bring international politics within the measure of legal standards. The conviction of major states that they must defend or promote a way of life cannot be ignored, rather it must be elevated and judged by objective consideration of human purpose which essentially transcends the particular interests of the states. The sources of human purpose lie inchoate within the general objectives of the United Nations.

The purposes of the United Nations, as expressed in its Charter, reflect a conviction of the importance of human rights in the development of international law and the preservation of peace. It is an affirmation of faith in the value of human person.[17] More importantly, it seeks to impress the power of states into the service of these humanitarian objectives.[18] This is a factor of profound significance for international politics, since the inescapable inference is that for the existing competition for domination there should be substituted an accountability to international society for the use of that power in terms of genuinely human purposes.[19] This is of particular significance for the Vietnamese conflict.

A predominantly juridical evaluation of the violence should lead to a cessation of the armed conflict. Measured by a norm of proportionate use of force, continued violence bears a disproportionate relationship to justified objectives. But this is only a partial solution. What kind of settlement is compatible with the human values which the international community must respect?

Beneath the generalities of human dignity in the Charter, Declaration of Human Rights and Draft Covenants, there lies profound philosophical and ideological differences as to their scope and content. Because of these divergencies of ethical meaning, some jurists, including Professor Falk, prefer to ignore these dimensions in favor of a depersonalized juridical solution.[20] But the interested states are passionately concerned with

17. U.N. Charter, Preamble.

18. See McDougal and Leighton, The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action, 59 Yale L.J. 60 (1949).

19. Although the nature of the binding force of the provisions is debatable, the overall commitment of the organization to the promotion of human rights necessarily entails some accountability of its members, especially in matters of peacekeeping since the Preamble expresses an interconnection between violation of human rights and the existence of warfare. Failure to maintain a connection between human rights and the activities of United Nations organs has been painfully demonstrated in the South West Africa Cases [1966] I.C.J. 4.

20. Law, Morality and War, supra note 3, at 12.

seeing their conceptions of human rights realized in South Vietnam. An attempt to deter them by superimposing upon their discretion the categorical imperatives of non-violence is futile. More importantly, the overall objective is to make the settlement of the Vietnam war a step towards the development of an international society. And by definition, a society is something more than the absence of violence; its very existence is dependent upon the positive sharing of a wide range of human values whose content exceeds mere physical security. The only creative way of measuring the conduct of states is to require them to justify their interpretations of human existence before the organs of the world community. International officials seeking to promote a settlement cannot avoid these humanistic considerations.

The point can be made forcefully by a specific example. Professor Falk makes much of the belief that if national elections were held in the fifties, Ho Chi Minh probably would have been victorious.[21] Yet if victorious, what would have been the status of human rights under a Ho regime? The widespread terror and executions in the North during 1955-1956 would very probably have been repeated throughout the country.[22] Could such actions pass muster before the conscience of mankind? Surely, at some point, the exigencies of Marxist history must come under some objective evaluation. Wherein lies the essential relationship between the person and the state? Does existence have meaning outside the demands of collective life? What judicial protection against the state does a commitment to human dignity require? These are not academic considerations, they bear directly upon the truly human dimensions of the Vietnam tragedy.

And what of our interest in the realization of democratic government in that suffering land? Is the constitutional assembly which we support truly representative of the people? Can there be genuine self-determination in South Vietnam where political power is held by wealthy Northern refugees? How can such a condition be truly conducive to the promotion of "social progress and better standards of life in larger freedom"?[23] Finally, do not the interests of all the people demand that all interested states moderate the absolutists demand of their ideologies?

In the modern world there can no longer be a purely democratic or socialistic government. All who are willing to accept peaceful procedures and fundamental human rights are entitled to participate in the political

21. Vietnam Critique, supra note 4, at 1129.

22. Department of State, Office of the Legal Adviser, The Legality of United States Participation in the Defense of Viet Nam, 75 L.J. 1083, 1099-1100 (1966).

23. U.N. Charter, Preamble.

processes. Through such coalition the abstractions of human dignity can take on greater particularizations.

We all desire the growth of a genuine international society, but insufficient attention is given to its attributes. World order is not just the absence of violence. Its vitality flows from a positive sharing of values. In spite of ideological differences, we must all strive to make these values more articulate. This is especially necessary in the civil war area because it is a focal point of conflicting ideologies. It requires an honest confrontation and dialogue between all those who hold contrary views as to the meaning of man and the nature of his destiny. Indispensable to this process is a confrontation of legal theory with the political motivations behind the actions of nation states. The international lawyer does both his nation and the world community a disservice if he abandons the political dimensions of foreign affairs in favor of a futile attempt to solve the question of intervention solely in terms of the imperatives of nonviolence.