

cosmopolitan enough to uphold those kinds of commitments. An intermediate position is needed between viewing international law as a solution for all problems and viewing it only as a technical tool.

International law needs to be established on the basis of a normative framework, as well as on a positivist foundation. Professor Myres S. McDougal has accomplished much in this direction already. It does not help at present to use international law as the only path to achieve a good foreign policy. Nearly any policy today can be rationalized legally. It does not help to generate respect for international law, or to make it more responsive, by claiming that there is only one legal solution to world problems.

International lawyers have only a marginal role to play at present in world affairs. The media does not report the activities at international law meetings because normative restraints do not govern the way things are presently structured in the world. To fashion a realistic, yet significant, role for international law in the future, it is important to emphasize the limits of international law and to concentrate on the way power is currently organized in the world. As Professor Robert W. Tucker pointed out in his study of world affairs,¹ international law is an instrument of the strong in the present world state system. The American Society of International Law can help to redefine what it means to be strong as a nation. It can help to "prepare the climate" for reordering the American notion of security and strength in a world order without a military power basis by focusing attention on normative values.

DISCUSSION

Professor FERGUSON expressed his regrets that the session had to stop early without adequate time for audience participation. He supported the idea of Professor Ved P. Nanda to receive written responses to the remarks of the participants on the panel. Professor ALFRED P. RUBIN announced that the Ad Hoc Committee to Review the Organization and Activities of the Society was anxious to receive the written views of Society members, too.

WILLIAM D. PEDERSON*
Reporter

COMMENT ON PROFESSOR FALK'S REMARKS BY ANTHONY A. D'AMATO**

Professor Falk's challenging remarks should not go unanswered. He has presented to this Society, and to international lawyers, the counsel of despair. He claims that any position on any issue can be justified and rationalized by international law, and he urges this Society to refrain from making any resolutions in the years to come on any question affecting the peace, security, natural environment or human welfare of the world. He regards this Society as a club that ought to keep its views on international law, even in regard to serious crises, to itself.

Professor Richard A. Falk is a giant in the field of international law. His prolific writings are brilliant, original, always challenging, and well-substantiated. It is my exceeding good fortune to have had the benefit of working with Professor Falk on a number of projects, including our coauthorship of a recent course book with

*Department of Social Sciences, Louisiana State University at Shreveport.

**Professor of Law, Northwestern University. This comment was submitted after the meeting in response to Professor Ferguson's suggestion, noted above.

Professor Burns Weston. Perhaps most important to me was Professor Falk's generous Foreword to my book *The Concept of Custom in International Law*.

Ironically, Professor Falk's brilliance of mind may be responsible for the cul-de-sac in which he now finds himself with respect to the efficacy of international law. Many successful attorneys find themselves, after a decade or two of practice, becoming supremely cynical about law. They realize that they tend to win arguments no matter what positions they take. A successful prosecutor, for example, may have a long string of criminal convictions to his credit. Then, entering private practice, he racks up a long string of acquittals in the defense of persons he realizes would have been convicted in his prosecutorial days. The natural result is that he believes that law is a chimera, manipulable by any clever attorney to any desired end.

In a way, this characterization is unfair to Professor Falk. As far as I know, he has not "switched sides," but has retained throughout his service to international law a quite consistent position. Nevertheless, he must be acutely aware of the manipulability of language, the differential impacts the same argument makes on different readers, the enormous amount of rationalization and strained argumentation that appears in international law discourse (especially that which is government inspired), and the often futile result of the argumentation. Perhaps this sort of cynicism accounts for his remarks today. And if I may engage in a little more amateur psychology, I would add that Professor Falk's acute awareness of the suicidal dangers facing the nuclear-armed nations of the world contributes to a view that is more painfully "realistic" than any position taken by the late Hans Morgenthau. (Interestingly, we were reminded two days ago by Professor Francis Boyle that in the last year or two of his life, Professor Morgenthau rejected his former "realism" and turned back to international law as a hope for just world public order.)

Of course, one of the problems of legal advocacy is that the addressees—judges, decisionmakers, the media, etc.—often do not have the level of sophistication of the attorneys making the arguments. The result is a confusion between which arguments are good and which are successful. Especially in international law, it is quite possible for writers and publicists to be misunderstood, to succeed for wrong reasons, and to conclude that that entire enterprise is nothing more than a gigantic effort at public relations.

I would hope that members of this Society reject Professor Falk's counsel of despair. It seems to me that there *is* a difference between a good argument and a bad one, and that at least those of us who are specialists in international law should be able honestly to discern that difference. It follows that not every policy can be rationalized either way by international law. If we are honest with ourselves and we scrutinize arguments that are made, we should be able to tell in all or nearly all cases whether a given government policy is or is not justifiable under international law. Prior customary law, treaties, and other tangible evidences of state practice are not equally balanced on every issue. In fact, the odds against a perfect balance are astronomical. On any given question or issue, preexisting international law should point to an unambiguous position, if that law is carefully and honestly analyzed. To be sure, any legal argument has a counterpart. Any international law justification spawns a rebuttal. But I do not believe that because there are two sides to every case, each side is equally convincing.

If Professor Falk really believes that international law can be used to justify anything, we might well wonder why he continues to publish in this field. I suspect that the answer is that my friend and colleague does not believe what he

said today—or, perhaps, he believes it today, but may have had a totally different viewpoint a month or a year ago and may have a totally different viewpoint a month or a year from now. But regardless of his own beliefs, which after all may never be known to anyone (including himself?), I think it is always important for the “realist” voice to be heard in the meetings of this Society. Professor Falk has a habit of shaking us up, of stimulating us, and of prodding us to be more careful about the things we say and especially about the things we lightly assume. I, for one, hope that this is a habit that he will not change.

PRESENTATION OF THE MANLEY O. HUDSON MEDALS

The presentation of the Manley O. Hudson Medals was made by Richard Young, Chairman of the Committee, at the Annual Dinner on April 25, 1981. Two Medals were awarded; the first was to the late Richard Reeve Baxter in recognition of

his extraordinary services to international law as soldier, scholar, teacher, editor, author, and judge. Judge Baxter served his profession as an officer in the Judge Advocate General's Corps of the United States Army, as Manley O. Hudson Professor of International Law at Harvard Law School, as Editor-in-Chief of the American Journal of International Law, as Counselor on International Law in the Office of the Legal Adviser of the Department of State, as President of the American Society of International Law, as consultant to the Government of the United States on the Laws of War, on the Law of the Sea, and on many other aspects of international law, as a Member on the part of the United States of the Permanent Court of Arbitration, and finally as a Judge of the International Court of Justice, where his term of office was cut short by his untimely death on September 26, 1980. Judge Baxter's extraordinary zeal in championing the cause of international law and his tireless exertions in guiding younger colleagues in serving the same cause have had a remarkable influence throughout the world, where his writings and speeches demonstrated those qualities of mind and heart which won him the ungrudging esteem of his colleagues on the Court as well as in the broader worldwide community of international lawyers.

The Citation was accepted by Mrs. Harriet Baxter.

The second presentation was to Oscar Schachter in recognition of

his outstanding services to international law, as a distinguished civil servant to the international community, as scholar and teacher. Before the end of the Second World War, he joined the humanitarian efforts of the United Nations Relief and Rehabilitation Agency, and in 1946 came to the United Nations Legal Department, first as deputy director then as director. For twenty years he served the world organization to international acclaim for his knowledge and understanding of the law, his contribution to its development, his wisdom, and his dedication to the purposes of the world organization. Later he served with equal distinction as Director of Research and Studies at the United Nations Institute for Training and Research until his appointment to Columbia University where he holds the distinguished chair of Hamilton Fish Professor of International Law and Diplomacy. He has enriched and illuminated the law, as counsel, as teacher, as scholar and author, and has earned the esteem of lawyers and statesmen throughout the world.