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ORDER AND CHAOS: THE ROLE OF INTERNATIONAL LAW IN FOREIGN POLICY

*Alfred P. Rubin**

POINTS OF CHOICE. By *Roger Fisher*. Oxford, England: Oxford University Press. 1978. Pp. vi, 89. £ 1.95; \$5.95.

Points of Choice is the fifth and last of a series of monographs growing out of a study undertaken by the American Society of International Law on the role of international law in government decisions. Using the material of the previous monographs, which analyzed in some detail the use (and non-use) of the tools of international law by the statesmen involved in the Cyprus situation of 1958-1967, the Cuban missile crisis of 1962, the Suez crisis of 1956, and the United Nations operation in the Congo during 1960-1964, and using some original examples as well, Professor Roger Fisher of the Harvard Law School argues strongly that a fuller appreciation by statesmen of the power of international law to promote national goals, including the goal of a more stable international political environment, would be effective and to the benefit of us all. His argument is temperate, well documented, simply stated with lively examples, and should be overwhelmingly persuasive even to those whose conception of the international legal order is as primitive as they so often, and so wrongly, claim that order to be. He proposes two major practical recommendations: that attention to international legal implications should be built into the organization through which the United States government formulates foreign policy goals and tactics, and that the delicate tools of international law should be used realistically, with an eye to their limits as well as their strengths. On that level of generality, no one can seriously quarrel with his conclusions.

On another level, Professor Fisher's conclusions are very much open to question. He amply documents instances in which America has failed to use the tools of international law to improve a negotiating position or a tactical political situation. He shows unmistakably that these failures are not the result of simple bureaucratic mismanagement or policy-makers' questionable evalu-

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ations of conflicting advice and nicely balanced interests. They are the result of what frequently seems to be a disregard of legal factors in decision-making. Such disregard directly affects American decisions that determine the immediate relations of the United States with all other states, and, somewhat less directly, it affects American tax rates, standards of living, and possibly even war and peace. It has more subtle effects too. On the most practical level, our foreign friends in their economic and political planning must calculate the reliability of the United States as a supplier of a stable currency in international exchange, an administrator of a regime of passage through the Panama Canal, a partner in a defense treaty, a spokesman for human rights, including rights of property, and in many other roles. The extent of that reliability is normally conceived to be reflected in formulations of law; not only the law of treaties, but in canons of construction found in international law just as canons of contract construction are found in national commercial law; not only in express promises to which the international legal order gives legal effect as treaties, but in a web of binding relationships giving stability to all international affairs and defining the distribution of legal powers to change those commitments in step with changing times and needs. On the record presented by Professor Fisher, the index of American reliability must be very low indeed. As a result, the world must be less safe for the investment of property and lives than it need be, and our share in what safety exists must diminish. Serious problems like this require serious remedies.

Professor Fisher's description of the problem and his proposed remedies do not seem to be serious. Throughout the book the language of games appears: "The international order, legal and political, is a game in which the rules and institutions are constantly being revised as the game is played" (p. 39); "If all the other players are respecting the rules of the game, if the game is fair, and if not too much is involved in any one hand, a strong case can be made for reconciling the pursuit of victory with the pursuit of peace . . ." (p. 78). "Games Theory" is useful. But carried to this extreme the game analogy, in my opinion, becomes part of the problem. It degrades the discussion by trivializing it. Real lives are involved, real standards of living, real (in some cases religious) convictions, and, however sporting the pursuit of peace and advantage may seem to some, it is not by any stretch of the imagination a game to others. It is amusing to refer to the interest of any "player" in winning *each* encounter, but in *not* winning *all* encounters, a witticism repeated in various forms at

least three times (pp. 61, 79, and 83) and which has a good deal of validity within the context of the American Department of Justice trying antitrust cases or state governments trying accused individuals; but it is hard to see how it applies in the international arena where, as Professor Fisher points out, the issue is normally not whether one "wins" but how to keep the system ("game"?) going in terms acceptable to all. The entire concept of winning games or encounters seems inconsistent with a serious approach to questions of life and death and the terms of survival.

This trivializing approach is in fact the root of the problem. All who have thought the matter through, with or without the aid of Professor Fisher's book and the well-documented, indeed magisterial, studies it rests on (one of the authors was himself Legal Adviser to the Department of State during the crisis he analyzes; all have had substantial experience in the government and a learned and experienced panel of commentators to help polish their monographs), agree that a state's perceptive use of the tools of international law markedly improves its chances of achieving both short- and long-term goals in the international arena. While President Nasser's reliance on the tools of international law did not assure the success of his policy to take over control of the operation of the Suez Canal, it certainly improved his position; while President Kennedy's reliance on the forms of international law, including the treaty-based inter-American system, did not itself ensure the basically favorable resolution of the Cuban missile crisis of 1962, it certainly influenced politics and tactics in ways favorable to American interests. These successes are not trivial. Nor are the failures that result from ignoring the international system. Many are cited in the book, and many suggestions are made as to how they could have been better handled. (To those who know Professor Fisher, it is clear that his suggestions are not mere hindsight, but the publication of ideas that he has expressed often before, frequently contemporaneously with the events he mentions.) The failures to achieve the practical results that would have been achievable through a knowledgeable application of legal argument and the use of tactics geared to the niceties of the legal order result in compromises that do not reflect the full range of pertinent relationships among states. Thus the results are imbalanced even when on the surface more favorable to the United States than would likely have resulted from a fuller appreciation of the weaknesses of our legal position. Such imbalances are reflected in longer range instability growing out of resentments and evasions by the states and individuals who

feel their rights have been overborne. The instability is even more obvious when the failure to use the tools of the law results in a compromise on the surface less favorable to the United States than a fuller appreciation of the strengths of our legal position might have achieved. Worse yet, a display of legal ignorance, no matter what the immediate result or lack of result at the negotiating table, degrades the United States in many unquantifiable ways. It leads directly to the loss of prestige and of the capacity to influence future events (which Professor Fisher calls "power" for purposes of his monograph (p. 11)). Thus, the patent erosion of American capacity to influence events can be laid in part to failures to take seriously the tools that statesmen have at hand when pursuing national policy. These are losses of major proportion. To give examples more recent than those cited in this monograph, it cannot have gone unnoticed to the principal shipping powers of the world that the Panama Canal documents recently concluded between the United States and Panama disregard America's continuing legal obligations to Great Britain (and possibly to all Canal users) under the 1901 Hay-Pauncefote Treaty; it has surely not gone unnoticed in Taiwan that America's "acknowledgment" that Taiwan is part of China as far as Peking is concerned makes it difficult for the United States to adjust its policy should a true Taiwanese independence movement appear. These seeming fumbles are not trivial, nor are they best described in the language of games. Such actions continued over time make it, as a practical matter, impossible for Egypt or Israel to accept American "guarantees" of a Middle East peace arrangement without American money to build military bases poised against each other. When we pay for such bases on both sides, not only is the cost excessive, but the return in the form of increased stability in the area may be illusory.

Before turning to the best means of recovering America's capacity to influence future events, it might be best to address briefly some common misapprehensions regarding international law. It is apparent from Professor Fisher's analysis that those misapprehensions exist at the highest levels of government in the United States and in the minds of many distinguished political scientists.

It is apparent to Professor Fisher, as to most professionals in the field, that the international legal order is not "primitive" or crude in any way. It is a highly sophisticated legal system which, like American constitutional law, relies for enforcement upon political pressures more than court action. A more precise analogy

might be made to the British constitutional system. The British constitution is not a single document; it is contained in many documents of varying degrees of legal persuasiveness and in practices of varying antiquity. It is enforced by political pressures of varying degrees of subtlety without policemen (although sometimes by armies). Treaties are not analogous to statutes except in the same sense that ordinary contracts represent law for the contracting parties. It is the legal order—the distribution of legal powers and the full context of the system—that determines the legal force of promises; and they are binding whether or not enforceable by courts, just as a purchaser's warranty will normally be acknowledged by a respectable shop even though any particular customer is unlikely to bring suit when exchange of a shoddy article is refused. The general international law regarding claims has a close analogy to the common law of torts; like international claims, the vast majority of potential tort actions are resolved in this country with neither party seriously considering police or court actions, but with both parties genuinely grappling with the problems of any civilized society, in which competing interests must compromise their desires at least for a while, to reach a resolution with which all can live.

In order to operate effectively within the international legal order, it is vital that it be perceived that there is such an order; that legal powers are distributed within it not solely on the basis of military or economic strength; that treaties are neither more nor less binding than some underlying law determines them to be; that rights of property are not "natural" but legal rights and are limited in the international sphere in ways analogous to the ways in which property rights are limited in all national law systems. The need for that fundamental perception of system and its basic tenets is routinely acknowledged within the Anglo-American legal order when we require all law students to study constitutional law, torts, contracts, and property. The need is no less for a practitioner within the international legal order and is most important when his client, whether a government or not, does not have the legal insight himself.

This perception of system need not affect the lawyer's or client's political orientation. Just as there are "liberal" and "conservative" private-law practitioners, there are able international lawyers in government, private practice, and academia at all points of the political compass. Knowing the system does not necessarily mean that an international lawyer will support any particular legal policy—*e.g.*, senatorial advice and consent to the

various human rights conventions—any more than all private-law practitioners will agree on any particular legislation or the desirability of a client's committing himself to any particular contract. But knowing the system does mean that one's support or opposition is likely to be based on perceptions of short- and long-range interest influenced by cases and writings that reflect distilled experience and deep thought. And if all international lawyers agree, surely that fact alone should be significant to those making American policy, not only as a matter of common prudence, but also because many foreign international lawyers hold positions of high influence in their own governments and their perceptions of American actions directly affect their own governments' policies.

The ability to function as an international lawyer is not rare. It is not often found among attorneys with no education or experience in international affairs, of course; it simply is not true that any good lawyer will function well as an international lawyer, just as it is not true that a good trial lawyer and a good municipal-bond lawyer are necessarily cut from the same cloth. But many law schools offer fundamental courses in international law, and a student's interest and some measure of ability (or, at least, speed in picking up the basics) can be gathered from the records of that experience. The Fletcher School of Law and Diplomacy alone graduates one or two appropriately trained lawyers each year, both under a joint-degree program with Harvard Law School and otherwise, and the reservoir of young talent is ample; there are graduate schools and law schools all over this country training young lawyers of equivalent caliber in equivalent skills. Literally hundreds of qualified specialists in international law represent foreign and multinational clients, participate in panels, write articles, and join in the activities of the American Society of International Law and other professional associations.

But as this is written, there is no one qualified in international law on the staff of either the House of Representatives Committee on International Relations or the Senate Committee on Foreign Relations. The current Legal Adviser to the Department of State is only the second since at least 1907 to hold the position of the United States' primary adviser on international law with no known background in that subject, and the first to show no interest in the American Society of International Law. How can the Congress or the Legal Adviser, without training or experience, judge whether a worthwhile contribution to policy can be made by those with such training? Professor Fisher's anal-

ysis and the studies that preceded it clearly reveal that they have judged wrongly.

Nor is this situation the result of a sophisticated decision by political scientists that there are better ways to perceive the international order than through lawyer's eyes. Amusingly, if not tragically, Professor Stanley Hoffmann of Harvard University, in the most recent book on the subject, *Primacy or World Order* (1978), seems to misconceive the international legal order, but derives the same system through his own reasoning and perception as a political scientist. And the evidence of Professor Fisher's monograph amply refutes any contention that American policy absent a serious consideration of international law is as effective as it would be if such consideration were given.

In this deplorable situation, what is to be done?

Professor Fisher proposes various steps to reorganize the handling of international legal problems within the United States Government. Within the Department of State, he proposes the appointment of "at least one deputy whose full-time job would be . . . [to] make certain that actions dealing with day-to-day crises took into account their impact on the international system" (p. 39). This proposal seems to be both too much and too little. Extra people are not needed because nobody with the job description of a lawyer-concerned-with-international-relations, even with the most petty technician's tasks in the office of the Legal Adviser, could do his job at a minimum competency level who did not routinely consider the impact on the international system of any proposal passing over his desk. There is no shortage of qualified young lawyers, and more experienced lawyers within the office of the Legal Adviser can easily shoulder the supervisory responsibilities for which they are paid, to assure the competency of their immediate subordinates. To distinguish, as Professor Fisher impliedly does, between the need for a senior lawyer to perceive the international legal order and the supposedly lesser need for junior lawyers and the Legal Adviser himself, is to degrade the functions of the Legal Adviser's office and to assume that the Legal Adviser and his senior subordinates need not be well grounded in the expertise that is the main function of their jobs. The Legal Adviser is not the personal attorney of the Secretary; he is the head of an office in the bureaucracy charged with supplying a kind of expertise that fits nowhere else in the government's organization. If the Secretary feels he needs a technician in some other area of law, he can appoint a special assistant. But the Secretary himself is not a mere individual; he is a government

officer with public responsibilities. And his senior departmental staff is not a personal staff; it is a staff of "Ambassadors, other public Ministers and Consuls" which, by article II, section 2, clause 2, of the Constitution, cannot be appointed without the advice and consent of two-thirds of the Senate. When an inappropriate or unqualified nominee is presented, it is the Senate's constitutional responsibility to give advice and withhold consent. Professor Fisher's recommendation, therefore, ignores the constitutional responsibilities resting on the Senate and the highest officers of our government. It is hard to see how his proposal can ameliorate a problem of incompetence for which responsibility rests with the President, the Secretary of State, and the Senate.

Professor Fisher's other proposals, all of which amount to shifting out of the Department of State parts of the burden of inserting the expertise of international lawyers into the government decision-making process, to the extent they are not themselves trivial seem to propose a cure that will not even alleviate the symptoms of the disease. One example that seems to incorporate most of the weaknesses of all of them should suffice to raise the issues:

In my view, the 'act of state' doctrine ought not to be applied by the courts—or urged on them by the Executive Branch—to preclude judicial consideration of issues susceptible of resolution by reference to, for example, codified and customary principles of public international law. [P. 85]

That very proposal was adopted by the Congress in the 1964 "Sabbatino Amendment" to the Foreign Assistance Act of 1961, as amended,¹ with regard to claims of title or other right to property based upon a confiscation or other taking after January 1, 1959, by an act of a foreign state. The result of that action by the Congress has not been beneficial to the international legal order or the United States constitutional order.

In 1964, Justice Harlan, speaking for an eight-to-one majority of the United States Supreme Court in *Banco Nacional de Cuba v. Sabbatino* wrote: "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. . . ." and added: "We do not, of course, mean to say that there is no international standard in this area; we conclude only that the matter is not meet for adjudication by domestic

1. Pub. L. 88-633, pt. III, § 301(d)(4), 78 Stat. 1013 (current version codified at 22 U.S.C. §2370(e)(2) (1976)).

tribunals.”² The “act of state” doctrine was applied and the Cuban nationalization was granted legal effect with regard to property reaching the United States.

In reaction, the Congress enacted legislation providing that “no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law” in such confiscation cases and set out what it asserted to be the relevant principles of international law, including one requiring “speedy compensation for such property in convertible foreign exchange, equivalent to the full value” of the property taken.

But, as the Supreme Court had pointed out, those “principles” are not clearly principles of international law. In fact, the principles of international law are in dispute and many states disagree with the United States’ negotiating position. It is that negotiating position, a mere “autointerpretation,” that is now legislated as part of the United States’ law; it is not necessarily a generally accepted formulation of international law.

And the legal power of the Congress to formulate negotiating positions for the United States and require them to be enforced as municipal law by American courts, while it has been upheld as constitutional in the particular case, raises serious constitutional questions whose ultimate resolution is not at all clear. On the face of it, the same constitutional considerations that inhibited the Supreme Court from adjudicating as a “domestic tribunal” on the matter should inhibit the Congress from legislating on it or requiring an adjudication. It is the executive branch of our government that speaks for the United States in international forums where the rules of international law are hammered out; that compromises claims and bears responsibility for formulating the American legal argument when a foreign government complains of the inadequate compensation we have offered following an American confiscation of foreign property here. Such cases have happened before³ and may certainly happen again. In these circumstances it is hard to see how the overruling of the act of state doctrine in a *Sabbatino* situation allows anything more than a rigid assertion of an argumentative American position by an American court in a case in which a foreign government will disagree as to the principles of international law that should gov-

2. 376 U.S. 398, 428 & n.26 (1964).

3. See, e.g., *Norwegian Shipowners' Claims* (Norway v. United States), 1 U.N. Rep. Intl. Arb. Awards 307 (Perm. Ct. Arb. 1922).

ern the case. Such a situation may strengthen a negotiating position of a private American claimant in some cases, or even of the executive branch in some claims negotiations, but at the cost of the balanced give-and-take negotiation that is the basis for persuasive rule-formulation in the international legal order.

Moreover, the implications should be examined of the escape valve the Congress left in the legislation when it provided that the executive branch might require the court, in disregard of the rest of the legislation, to apply the act of state doctrine when the President determines that that application is required in a particular case by the foreign policy interests of the United States. It is hardly a justification for meddling with the constitutional distribution of responsibility within the federal government that the individuals saddled with a responsibility can get it back when they choose. If the President does not choose to make the appropriate determination, the Supreme Court would appear to have no alternative but to hold the Sabbatino Amendment unconstitutional or to apply the Congress's version of the American position on a question of international law, to the potential embarrassment of succeeding Presidents and the country as a whole. This hardly seems the way to enhance respect for the international legal order in government decisions.

Moreover, the Supreme Court is in many cases no willing recipient of responsibility with regard to international law. In a recent decision construing the act of state doctrine in a foreign confiscation situation, *Alfred Dunhill of London, Inc. v. Republic of Cuba*,⁴ the Supreme Court split four to four, with the one "swing" Justice expressing no opinion on the question whether the "act of state" doctrine could bar a recovery. The four dissenters invoked the Supreme Court's policy "of avoiding potential interference with the executive channels through which our nation deals with others."⁵ The dissenters apparently felt that the executive's failure to act, and its willingness to pass the buck to the Supreme Court, did not relieve it of the constitutional responsibility to resolve questions of international law by international correspondence and action.

In these circumstances, it hardly oversimplifies Professor Fisher's argument to say that it attempts to saddle an unwilling and ill-equipped judiciary with a responsibility that constitutionally belongs to the executive branch, and that the latter's incom-

4. 425 U.S. 682 (1976).

5. 425 U.S. at 737.

prehension of international law is hardly remedied by attempts to transfer its functions either to the Congress or to the judiciary. The simple answer to the organizational problem is to staff the executive branch so that it can fulfill its constitutional responsibilities, starting by replacing the technicians in the office of the Legal Adviser of the Department of State—however competent as technicians, as lawyers in fields other than international and constitutional law, or as political advisers—with competent international lawyers. That is the conclusion that flows from Professor Fisher's analysis; his more moderate conclusions are not so moderate as they are short-sighted or inappropriate to the problem.

Professor Fisher has written a book summarizing a series of studies on the importance of international law to rational and perceptive decisions in international affairs. The book demonstrates its thesis in measured tones and with many examples. The language of the exegesis, however, is taken from games theory and applied too literally, thus trivializing the problem. Professor Fisher's proposals to ameliorate the problem continue this trivialization and seem inappropriate. But the problem itself is so clearly demonstrated and the truly ameliorative steps so obvious that the competence of national leadership in the area of foreign affairs can be measured by whether those steps are in fact taken. If not, our national leadership will have a great deal to answer for before the bar of history.