

## Windsor Yearbook of Access to Justice

Book Review: Richard A. Falk, *The Costs of War: International Law, The UN and World Order* (Abingdon, Routledge, 2008)

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*The Costs of War* ultimately represents an impassioned plea for an ideological shift in international affairs on the part of both governments and individuals, particularly in the context of the use of military force. In it, Professor Falk highlights the damage caused to world order by what he views as the progressive slide towards a geopolitical realist approach to international politics and away from Wilsonian international co-operation and normative restraint: a slide that culminated in the 2003 military intervention in Iraq. Importantly, he argues for the potential *utility* of international norms (most notably international law) as a means for better securing world order.

Falk offers a clear thesis: that we need to move (back) towards a reliance on international law with regard to institutionalised international violence. This thesis is essentially presented through three related claims. The first of these is that recent history, particularly the case of Iraq, demonstrates a progressive marginalisation of international law. Second is the claim that this marginalisation is damaging to world security and order. The third argument set out is that an ideological shift back towards normative order offers genuine political advantages – particularly security advantages – for all states, including the US.

Unsurprisingly, given who its author is,<sup>1</sup> *The Costs of War* unashamedly wears its politics on its sleeve. The book is boldly critical of the neoconservative policy agenda and shines an unwavering spotlight on the key post-Cold War instances where international law has been unable to prevent international conflict. Falk indicates that this inefficacy of international law relates more to the fact that powerful states – in particular the US – *have failed international law*, rather than to the inherent failures of international law itself. The book presents a convincing picture of systematic disingenuous manipulation (what Falk calls ‘mystification’) on the part of the American right with regard to the various manifestations of the ‘war on terror’.

Yet, whilst Falk is unambiguously anti-realist, he is nonetheless realistic in his approach. International law is not presented as a utopian ideal capable of curing the world of ‘the scourge of war’, but rather as an invaluable tool that may be used to restrict – to a degree – the use of military force internationally. For example, he acknowledges that in certain ‘Kosovo-like’ circumstances, it may be necessary to conduct ‘illegal but legitimate’ wars: strict adherence to the law in such circumstances is likely to mean that it is viewed as an irrelevance, and this may be as damaging as ignoring it entirely. However, he also argues that legitimacy in the face of illegality must be extremely strictly construed and that UN supervision and early non-forcible responses to root causes are desirable alternatives.

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*The Costs of War* does not claim that its proposed process of ‘demystification’ or ‘reviving the normative consciousness’ of international society is likely to be an easy one. Similarly, this book does not hold that international law is by any means effective in the context of warfare at the current time; only that it *can* be. It simply hopes that the growing drive from ‘civil society’ towards accountability and respect for international norms (embodied for Falk in the 2005 ‘World Tribunal on Iraq’) can have an impact on the ideological approaches of those in power in the US and other dominant states. As such, this amounts to an aspirational work.

As one would expect of a scholar of Professor Falk’s reputation, the conclusions reached in *The Costs of War* are largely undeniably rigorous. Thus, whilst the book has a clear political slant – even occasionally being acerbic in tone – the arguments set out are well supported by the evidence, and are therefore, in the majority of instances, difficult to dispute. Yet irrespective of its rigorous approach, the greatest strength of this book is its *accessibility*. It is not overly technical in terms of its analysis of international law, and is highly readable. It is a book that can appeal to anyone who is interested in international relations, geopolitics and world order, but is also an extremely interesting thesis for international lawyers. Having said this, the book predominantly presents arguments that have, in some form or other, already emerged in other critiques of the Bush administration and the ‘war on terror’.<sup>2</sup> What makes this book stand out is the clarity of its argumentation, and the fact that its critique is directed towards an understanding of the role that international law can – and should – play. For instance, it does not simply hold that the Iraq intervention was unlawful, but, rather, goes further and indicates *why that unlawfulness matters*.

Of course, the downside of accessibility is that some important technical discussions are sacrificed in favour of clarity of thought. An example of this – notable through absence – is the fact that there is no discussion of the crucial UN Security Council resolution 1441 ‘revival’/‘automaticity’ argument in the context of Iraq. This argument has been extensively discussed elsewhere,<sup>3</sup> and its detailed inclusion here would perhaps have turned the book into something it was not designed to be, detracting from the more general points it was trying to make. Nonetheless, an acknowledgment of this debate and at least its essential parameters would have greatly strengthened the key claim that the Iraq intervention in 2003 was an unlawful use of force. Instead, Falk focuses only on the, admittedly patently unlawful, ‘Bush Doctrine’ argument of pre-emptive self-defence (force in response to a *non-imminent* threat), ignoring the fact that, in the end, this only formed a secondary legal claim for the 2003 attack.

Similarly, whilst as noted the majority of the conclusions reached are extremely well evidenced, the repeated claim (most prominent in Chapter 12) that the Iraq intervention constituted a ‘crime of aggression’ is not adequately supported. It is certainly possible that a charge of aggression could be directed at decision makers in the US government and those of other coalition states, but such a claim is far from as evident as Falk suggests. *The Costs of War* avoids any discussion of the longstanding

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<sup>2</sup> A useful summary of many of these arguments can be found in JN Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (Aldershot, Ashgate, 2005).

<sup>3</sup> This much discussed legal argument is well set out and critiqued in D McGoldrick, *From ‘9-11’ to the Iraq War 2003: International Law in an Age of Complexity* (Oxford, Hart, 2004), 53-67.

and ongoing problems with defining the concept of aggression,<sup>4</sup> and perhaps focuses too much on the *Nuremberg Tribunal* rather than more recent developments in international criminal law.

As this book was initially published prior to the unbridled wave of hope and optimism – both in the US and around the world – that greeted the political shift from Bush to Obama, one might well argue that *The Costs of War* has quickly lost its relevance. A book that critiques the neo-conservative marginalisation of international law and the highly questionable (if not patently unlawful) uses of force during the eight years of the Bush administration, surely no longer possesses the importance that it did on publication. In fact, it is clear that the opposite is true. This is a book that can offer guidance for the future, even for an administration (and the citizens under it) which has a very different political outlook to that of its predecessor. Whilst it is tempting to see Obama as the global saviour that he is sometimes presented as being, it is notable that he has failed to reject the ‘Bush Doctrine’ of pre-emptive self-defence: indeed, he appears to have endorsed it, at least to an extent.<sup>5</sup> This highlights that the realist cloud that *The Costs of War* identifies so well is far from wholly disbursed post-Bush. It is the *forward thinking* aspects of the book which ensure its continued relevance, perhaps even more so now that the US has a government which may be rather more inclined to follow Falk’s lead.

Overall, *The Costs of War* represents a valuable addition to the literature on international law, the use of military force and the ‘war on terror’. The conclusions reached are, for the most part, extremely persuasive, but the book is probably most notable for its clarity of thought and ability to present complex ideas of shifting ideological consciousness in a digestible form.

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<sup>4</sup> See J Trahan, ‘Defining Aggression: Why the Preparatory Commission for the International Criminal Court Has Faced Such a Conundrum’ (2002) 24 *Loyola of Los Angeles International and Comparative Law Review* 448.

<sup>5</sup> American Society of International Law interview with Barack Obama, 2008, available at: <http://www.asil.org/obamasurvey.cfm> (see ‘Laws of War and the Use of Force’ section, question 3).