

cause they profess to serve. Self-evident though it may be, they must be reminded that consensus cannot be divorced from consent.

On the other hand, disaster also awaits down the path of autodetermination, the path of the consensus of one.

If I am allowed to mix my metaphors, I would say that the law need not be an ass. It can be the jawbone of an ass—to give strength to the strong, as well as justice to the less strong, and stability and order for all.

This meeting of the American Society of International Law provides an opportunity to reaffirm the role of law and the rule of law in international relations. Joint sponsorship of today's luncheon by the ASIL and the Canadian Council on International Law is especially appropriate.

Legal exchanges are no small part of the multiplicity of exchanges between our two countries. International law is too important to be left to governments. At the same time it is too important for governments to be allowed to leave it to the scholars. Meetings like this are an indispensable part of an indispensable dialogue. Thank you for inviting me to participate in it.

MCDUGAL'S JURISPRUDENCE: UTILITY, INFLUENCE, CONTROVERSY

The panel convened at 3:00 p.m. April 26, 1985, Burns H. Weston* presiding.

REMARKS BY THE CHAIRMAN, BURNS H. WESTON*

I am very honored to be here to moderate this panel discussion on the jurisprudence of Myres S. McDougal and his colleagues. I think it is safe to say that it is a jurisprudence that has stirred up a certain amount of controversy, both jurisprudential and political. I think many people perceive McDougal's jurisprudence to be politically biased. There are many who find it to be linguistically impenetrable—although I would hasten to encourage them to consult a dictionary, because none of the words used is unfathomable by any means, and some people would say that the whole methodology is entirely too complex and too time consuming, but that is not very persuasive either, inasmuch as a methodology and jurisprudence that seek to relate law and society—as complex as that connection is—must of itself be complex necessarily.

I will introduce our panelists briefly. Oscar Schachter may well be as close a long-time associate of Mac's as anyone, with the possible exception of Harold Lasswell. Mike Reisman, whom you all know, is a disciple who has clearly acquitted himself with distinction. And Dick Falk, also a student of Mac's, sometimes describes himself, or perhaps it is Mac who so describes him, as one of Mac's black sheep. And then, of course, we will hear from Mac himself, who I note is listed here—implausibly—as merely “commentator.”

REMARKS BY OSCAR SCHACHTER**

Who would have thought that a discussion of jurisprudential theory would pack the room on a lovely April afternoon? Evidently our program chairman underestimated

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the drawing power of legal philosophy, the attraction of McDougal and perhaps the hope of some that blood will be spilled here today.

Professor Weston has mentioned my long association with McDougal and Harold Lasswell. From 1955 to 1970, the three of us conducted a seminar at the Yale Law School on "World Public Order." It was an invigorating intellectual experience. Lasswell and McDougal were in the early stages of developing their grand edifice for understanding the role of law in achieving order and human dignity on a global scale. They opened up new intellectual vistas and forced me—and the students—to confront our inarticulate premises and to think hard about the uses of law in a divided world. They compelled us to learn a new language (which, like some of my other foreign languages, I now comprehend but cannot speak). The students—many of whom I see here today—were caught up in the excitement of a new intellectual adventure. It was exhilarating, and as I have written elsewhere, I owe an enormous debt to Mac and Harold for that experience. Mac's combativeness spiced our discourse; his warmth, humor, generosity and kindness won our affection. His friendship was and is highly prized.

However, I have been invited here not to praise McDougal, the man, but to appraise McDougalism, the theory. That theory is as complicated and many-sided as McDougal's personality. I shall try to get at the essentials. In particular, I will focus on what seems to be the principal controversy engendered by his approach to jurisprudence and international law—namely, the criticism that his policy-oriented jurisprudence reduces law to politics and eliminates the distinctive normative quality of law. The thrust and effect of this "reductionism," it is charged, is to obscure significant distinctions and confuse analysis. Above all, the complaint charges that by subordinating law to policy, the McDougal approach virtually dissolves the restraints of rules and opens the way for partisan or subjective policies disguised as law. This charge has a fresh significance in the light of recent accolades bestowed on McDougal by Ambassador Jeane Kirkpatrick.

Let me begin with a few general observations to clear the ground. Most of us agree with McDougal that international law is not merely a set of ideals or aspirations, that it does involve the exercise of power, legitimated power. We also agree that law serves social ends and values, and that it is appropriate for lawyers to examine and criticize law in the light of such ends. Most of us recognize with McDougal that law is not autonomous—that its rules and decisions have causes and consequences—and that it is appropriate for lawyers to take them into account. For all these reasons, we are more or less in accord with McDougal that law is part of the larger political and social process and that it is influenced by factors that operate in politics generally.

We enter into more controversial ground when we consider specific aspects of the Lasswell-McDougal theory. I will comment on the following: (1) the conception of law as "a process of authoritative decision;" (2) the contextual approach to law and the range of considerations appropriate for legal decisions; (3) the use of policy or higher ends to prevail over—to trump—specific legal rules.

The notion of law as a process of authoritative decision—rather than as rules of constraint—is a basic tenet of the policy-oriented approach. On that view, law embraces decisions taken in all social interactions that involve "perspectives of authority," by which McDougal means decisions taken in conformity with what is considered "right" or "appropriate." The terms "authority," "right" and "appropriate" are meant to refer to a range of decisions that carry with them "expectations of compliance." They are not limited to decisions of official bodies, courts or legislatures. However, an important requirement is that such decisions are, in McDougal's

term, “controlling;” they must govern behavior. This requirement brings in the element of power defined as the capability to influence behavior. Hence the process of law involves both authority (legitimacy) and power. While these are differentiated, they are symbiotically interrelated: “authority” tends to disappear if not effective; power without authority (Mac likes to call it “naked”) is either successfully challenged or acquires authority.

An obvious question is whether this conception of law as the process of decision involving “authority and control” extends the concept of law so widely into political and social decisions as to constitute a kind of disciplinary imperialism in which law rather than politics becomes the ruling policy science. Well, why not? If this conception of law clarifies the relation of authority (legitimacy) and behavior (or “control”) it should not matter intellectually which academic department or discipline carries out the analysis in specific contexts. The question is whether the conception is illuminating, and in many respects I have found it enlightening. For one thing, it helps us to understand the pervasive role of “perspectives of authority” in the sense of the expectations of people engaged in political and social affairs as to who may legitimately make decisions, under what conditions, and for what purposes. By emphasizing linkages between authority and behavior, the McDougal approach is a corrective to the tendency common among political scientists to perceive political behavior solely in terms of the “realities” of power and interest.

Those realities are not ignored by McDougal. He does not see law simply as an expression of conceptions of what is right or just; it must also be an effective determinant of behavior. When these basic ideas of authority and control are applied to particular problems in a systematic manner (as McDougal and his colleagues have done in their voluminous works), I believe we get a better understanding of the complexity of the processes in which law and power interact.

On the other hand, I do not see it as winning acceptance as an operational definition of law. However enlightening it may be as an insight into political processes—and as a help to understanding that law involves many more functions than making and applying rules—the community of international lawyers is not likely to “buy” the conception as a working definition of international law. One reason is that they see it as requiring inquiries into an almost undefined terrain of ongoing political decisions and attitudes. They would be expected to ascertain what “shared expectations” prevail among peoples everywhere and how such expectations are affected by power, interest and value preferences that bear on the political choices. The empirical task envisaged is not merely daunting; it is wholly unrealistic as a practical undertaking for lawyers. The eloquence with which this conception of global decisionmaking is presented cannot conceal its impracticable character. Endless questions are asked; few are answerable. They are therefore of little use in answering the question of immediate concern to lawyers and governments: whether particular conduct is lawful or unlawful. That question is dissolved into a highly uncertain and endless quest for shared expectations, value preferences and power relations on a global scale.

In sum, much as I admire the vision and grandeur of the Lasswell-McDougal edifice and see its corrective role for some purposes, I believe we have to view international law in a more precise way, as an order concerned with binding rules and obligations and with their principled use in defining choices and justifying action. This need not lead us to accept Austinian positivism or a “rule-oriented” approach that relies heavily on syntactical and semantic analysis. We can still recognize (with McDougal and others) that the processes of creating and applying such rules and

obligations necessarily involve conditions, determinants and values that fall outside the law.

This leads me to the question of the extent to which such “nonlegal” considerations may properly enter into the processes of legal decision. McDougal’s concept of “contextuality” allows all factors to be considered to the extent that they are relevant to reasoned decision. What is relevant depends on the particular circumstances of the case and the policies or values affected by the decision. Such open-ended use of “contextuality” leaves no room for a relative degree of autonomy in the application of law. In considering contextuality, we must distinguish between the creation of rules (in McDougal’s language, the prescribing process) and their application. Clearly, “legislative” acts—the creation or amendment of rules by treaty or customary process—require that consideration be given to policy goals, conditions, future developments, whatever seems relevant to reaching a reasonable and desirable result. But so sweeping a statement cannot be made about the *application* of law. In that function, the law-applying organs—whether tribunals or states—are subject to limits in regard to the considerations they may properly use. When a question is presented as to whether a rule is binding and applicable to the particular facts, it must be answered by reference to the norms of the relevant system. Those norms, or the criteria of validity—some would call them the secondary rules of recognition—set limits on the relevant contextual factors.

This does not mean, in itself, that purposes or policies are irrelevant or that patterns of state conduct must be ignored. It does mean that the extent to which those considerations are relevant must be determined by the legal system, rather than by an open-ended concept of relevance and contextuality. McDougal, I believe, conforms to this conclusion in practice, if not in theory. In his writing and surely in his legal briefs, he relies on precedents, treaties and established legal concepts as the basic foundations of his legal arguments. He is practical enough to realize that a government or a tribunal needs to know whether an asserted rule is applicable and binding when consideration is given to the legal propriety of an action. A government may not like the rule, it may decide to violate it, it may seek to change it. But it cannot answer the question of whether it is legally bound merely by referring to political aims or social conditions. In that specific sense, law must be independent of politics. A law-applying organ must have a relative degree of autonomy, even if in a wider sense the legal system is not autonomous. On this point, I believe McDougal, the practitioner, is on the right track whereas McDougal, the theorist, is off in the wrong direction.

This brings me to the controversy about the role of policy in the application of law. Here, too, I note that McDougal, in practice and argument, is often “traditional” in his reliance on “policy” to interpret and apply the law. I mean by that that he and his followers generally turn to well-established principles and precedents for statements of purpose and policy. Treaties and state practice are their major sources of accepted community goals, and they often skillfully (and selectively) use them for arguments and justification that serve their chosen ends. They have no difficulty in culling from the mass of purposes expressed in official texts those which can be construed to support their postulated goals. Faced with competing policies, they do not hesitate to proclaim those they consider the “enduring” and most “intensely demanded” expectations of humanity. With the help of these phrases, McDougal marries shared expectations and the postulated values of humanity. They are, *mirabile dictu*, the particular policies that McDougal favors. Further empirical research is hardly necessary in this best of all possible worlds.

Consider also McDougal's description of customary law as a process of claims, counterclaims and tolerances that "create expectations that power will be restrained and exercised in certain uniformities of behavior." I find this illuminating as a description of a process, but McDougal does not stop with description. He regards the customary process as "value-clarification," and he generally finds that actual patterns of behavior reveal "perceptions of common interest" and shared purposes. He fortifies this by emphasizing "reasonableness" as a determinant of behavior of states and not merely a standard to judge such behavior. His article on the legality of nuclear tests in volume 49 of the *American Journal of International Law* is a notable example of this type of "normative" double play.

Reminiscent of Adam Smith's unseen hand, McDougal's assumption of reasonableness and restraint serves to convert the separate pursuit of self-interest by national states into law that he finds serves the common interest of all. I do not mean to deride this notion; it suggests a useful criterion for judging the merits of customary rules. But I must point out it weighs heavily on the side of the status quo. It is true that McDougal sometimes calls for empirical studies to show whether actual state practice serves the preferred values of people. But this idea—which almost surely originated with Lasswell—requires involved studies on so large and complex a scale—especially if one takes into account all the McDougalian variables—that it is far from realizable. Since there are no such empirical studies, McDougal has not been deterred from finding most of customary law to coincide with the expectations of people, with their preferred values and with what McDougal himself prefers. In theory, this desirable trio may not always coincide but somehow, Mac nearly always finds that his own preferences are the key to what is in the common interest and in accord with the shared expectations of "all peoples."

Of course, McDougal does not maintain that his own preferences should determine whether state conduct is lawful. Nor does he claim in his theory that the goals and values of the United States provide criteria of international legality. What he does assert is that the ultimate test of lawfulness of an act or decision is "its consonance with the fundamental goals of the international community." Such fundamental goals must prevail over the "secondary" expressions of international policy found in legal rules, treaties or judicial decisions. According to the theory fundamental goals are discoverable by empirical inquiry into the values that people actually hold. It rejects "transempirical derivation" of values as in traditional natural law doctrine.

But how does one discover the values that some 4 billion people actually hold? McDougal has no great difficulty. He finds without any research but quite plausibly that the "overwhelming numbers of people of the world" want peace, security, respect, the right to determine their own destinies. These aspirations are summed up as the values of human dignity. They can also be found in expressions in the U.N. Charter, the Universal Declaration of Human Rights and in statements of "moral leaders of mankind." Since they are phrased in the broadest terms, they are open to various interpretations compatible with diverse institutions. From an American and Western European standpoint it is easy to relate them to the political credos of liberal democracy, carried over into the international instruments in the postwar period. A cynical critic may question the assumption that these values are universally shared. It is not only that they are rejected by many repressive regimes; it is also evident that peoples everywhere manifest aggressive tendencies, show contempt for different faiths and cultures, seek to dominate and coerce others. Can we say on a purely empirical basis that respect for the worth of an individual is a value held by most peoples? We must recognize that the goals attributed by McDougal to most of humanity owe more to

ethical distillations and to rational conceptions of the ideal polity than to an empirical finding as to what people actually desire. I do not consider this as a defect. It seems to me entirely appropriate in public policy to give precedence to those aspirations that result from ethical reflection and rational clarification of human ends. Perhaps this brings in some “transempirical” elements that resemble natural law thinking without theology or metaphysics. The important fact for law and international politics is that these “higher” values have been accorded normative status by their inclusion in authoritative instruments that have been accepted by virtually all of the world’s governments. Only a few people would deny today that such goals as peace, respect and self-rule should be given effect in law and policy. In that sense, they have an empirical basis as well as the normative force of moral ideals.

Their normativity also has a legal character inasmuch as they are embodied in legal principles expressed in such authoritative instruments as the U.N. Charter and other major treaties. It would not be inaccurate to refer to them, in the words of Wilfred Jenks, as expressions of the “policy of the law and not of any individual, government or school of thought that claims to be above the law.” It is but a short step from this conclusion to the position of McDougal that the major goals set out in the international instruments should be given effect in determining the lawfulness of particular action. This normative conclusion also has a factual counterpart—namely, that the application of law (and not only its creation) is greatly influenced by the perceptions of states and tribunals as to the relation of fundamental goals to the particular legal issues. In short, well-considered decisions on issues of international law by governments and law-applying organs take into account the basic ends of the law. This is not only proper for the reasons stated; it is also desirable to resolve issues that cannot be settled simply by the “plain meaning” of a rule. Rules, as we know, have “open textures”; opposing principles compete for priority; intentions and acceptability require consideration. These factors, so often stressed by McDougal, are sufficiently frequent in international law as to make it necessary to look to the purposes and policies, particularly those considered fundamental and universal, for determining the application of legal prescriptions in specific cases.

Having thus put the case for a policy-oriented approach, I turn now to its dangers, or perhaps I should say its dangerous temptations. The first and most apparent danger is the implication that a clear and specific rule of law or treaty obligation may be disregarded if it is not in accord with a fundamental goal of the international community. One does not often find this proposition stated so boldly in McDougal’s writings, but I am indebted to Michael Reisman for expressing it without equivocation. In *Nullity and Revision*, he writes in respect of decisions of an international arbitral or judicial tribunal at page 562:

Though the decision may diverge from the purport of either the special rule of the compromis or a general rule of international law . . . , the test of the decision’s lawfulness is not its conformity to these secondary expressions of international policy, but its consonance with the fundamental goals of the international community.

The clear import of this position is that every rule of law and every judicial decision, however clear and well-grounded in law and fact, may be impugned and invalidated on the ground that it is not in accord with a fundamental goal of the international community. Consider for a moment what this may mean if followed through. Any specific rule restricting the use of the oceans may be overridden because it is not in consonance with the fundamental goal of freedom of the seas. The unanimity rule of the Charter may be disregarded on the ground that it is not compatible with the

higher value of peace and security. McDougal, indeed, took this very position about 33 years ago. (I suspect that today he would adopt a contrary view in the light of present U.S. interests.) One might attack the decision of the International Court in the Tehran hostages case as invalid by asserting it gives effect to diplomatic immunity, a “secondary” international policy rather than to national sovereignty, a “fundamental” goal. These examples, extreme as they appear, are nonetheless in point. They reveal how easily legal rules may be nullified by an appeal to higher ends.

It is obvious that fundamental goals may point in opposing directions—peace versus justice, freedom versus order. McDougal refers to these antinomies as complementary, but in concrete cases, they present a choice—either can be cited as the decisive goal. Added to this are the well-known factors of indeterminacy in applying highly general principles to particular circumstances. Policy-oriented writers stress the relative flexibility of international prescriptions. They come close to the legal realists’ brand of rule-skepticism, in emphasizing that legal prescriptions leave a wide range of discretion to the law-applying organ. However, unlike the legal realists, McDougal and his followers take the strongly normative position that the indeterminacies in the legal process should be resolved by reference to basic purposes. Since competing major purposes still provide a choice of results in most cases, they increase the discretionary element in applying law. It becomes possible for any state to assert its freedom from specific legal restraints on the ground that a basic community policy would be affected adversely by the state complying with the legal restraint.

The dangers of this approach become still more apparent when the higher goals are determined by the particular policies of a national state. In the present world, international lawyers are no more immune than others from the powerful pressures of their national communities. That they tend to regard their national state’s conduct and policies as more conducive to achieving universal ideals is understandable. Sentiments, education, information sources and deeply rooted affinities are likely to prevail over the claims of distant, uncongenial societies. I do not mean to slight or deride the natural forms of patriotism. But I would suggest that if national interests are always perceived as the fundamental goals of the world community and those goals are treated as grounds for overriding rules developed by agreement and customary law, we can no longer have an effective international legal system.

This is not to say that a disciplined reliance on basic ends of the law is undesirable in applying rules and legal procedures. Such policies have a proper place. They must be policies accepted by the international community (or the relevant group of states to which they apply). They must be applied in a way that is not destructive of a basic element of law—namely, that an entity subject to the law cannot decide for itself in the last analysis whether and to what extent it is governed by a legal rule. It may of course disregard a rule and face the consequences, or it may seek to change the law for reasons of its policy. However, it cannot assert as a matter of law that its own political interest is a sufficient ground to deny the application of an accepted rule of law.

I would also add that the application of international rules of law should conform to the basic principles of a pluralist society of independent states. That state-system, which is the foundation of present international law, rests on the premise of autonomy and diversity of national territorial communities. The right to separate ways of life and beliefs is protected by principles of sovereignty and nonintervention. The United States has long favored these principles and warned against coercive intervention by powerful states into the domestic affairs of others. That it has from time to time deviated from this principled position is a matter of historical record that I need not dwell upon. What is germane to my present task is the tendency on the part of Mc-

Dougal and others in the policy-oriented school to apply their theory in a highly selective manner to override the constraints of law in favor of the “higher ends” sought by present U.S. policy. Their strong patriotic attachment to U.S. institutions and their concern over “totalitarian” dangers are understandable reasons for their political views. But the selective application of their jurisprudential theory in emphasizing certain policy objectives as fundamental goals and minimizing others has thrown a sharp light on the dangers of policy-oriented jurisprudence. If applied with a nationalist bias, it becomes an ideological instrument to override specific restraints of law. Neither treaty nor general rules of international law—however firmly agreed—can prevail if they are said to run counter to a fundamental goal favored by that particular state. The consequences of such unilateralism become even more troubling when it is accompanied by a deep distrust of international judgments, whether made by political bodies or by the principal judicial organ of the international community.

Thus, in place of the inspiring conception of a world community first proposed by Lasswell and McDougal, in which law and policy were conjoined to serve universal goals, we now seem to have a unilateralist version of policy jurisprudence in which law plays a secondary role and policy is determined by the perception of self-interest of a particular state. This is a far cry from that earlier vision. It leads me to appeal from McDougal, the elder, to McDougal, the younger, for a reversal of the present position and a restoration of their earlier ideas in support of effective law in a world community that is neither hierarchical nor coercive.

REMARKS BY W. MICHAEL REISMAN*

I would like to state what seem to be the major reasons why the work that Professor McDougal has done is important. I will not take the time to correct the many misstatements made by Professor Schachter but will move to what are the critical issues of continuing importance to our profession and to the perilous state of world order.

I should like to make one point before I address those issues: to suggest for one moment that McDougal has undermined a very stable house of international law is absolutely preposterous. If international law were working as it is supposed to be working, McDougal and his associates would have been among the first to use it in that fashion. The system was not working before World War I, it was not working in the interwar period, it was not working and did not stave off the violence during World War II, and it has hardly minimized the peril of the high expectation of violence since then. The idea that we have iconoclasts here who are taking apart a system that works very well as a logical system of rules is pure fantasy. It was a constructive operation undertaken by McDougal and Lasswell in the world community shattered by World War II, precisely because the classical system and the classic legal tradition were not working. I would like to explain why, and from time to time make some references to the previous comments, and in doing so to set out the fundamental thrust of the enterprise to which McDougal and his associates have devoted themselves for more than 40 years.

In a paradoxical way, an efficient legal education in the United States equips its recipient for operations in the complex decision processes of an advanced industrial democracy but can disable the same lawyer from apprehending and working effectively with many of the persistent features of the international legal system. The legal system in the United States and its environing political system are characterized, to a high degree, by a coordination of formal authority and effective political power and a

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prominent and efficient role for the national courts. As a result, the U.S. lawyer relies upon the institutional picture presented in written law as an accurate representation of the actual processes of decision, without engaging in the frequent corrections of focus on the "law in action" of his international counterpart in a less coordinated system.

This reliance encourages a conception of the "rule of law," a complex symbol which encapsulates and mythologizes the practices of the U.S. system and posits that a hallmark of a legal system is the conformity of decision practices to some written text. As part of this, U.S. lawyers are trained—and reinforced by experience—to look regularly for guidelines of appropriate behavior to certain authoritative institutions which express themselves in rules. Rules, from the petty "do's and don'ts" of everyday life to the Rule of Law writ large, become synonymous with law. It is significant that U.S. lawyers refer even to the positive moral precepts which should guide their behavior, not as ethical principles, but as the "Code" or "Canons of Ethics."

This professionally acquired predisposition to rely upon formal institutions as indicators of where law comes from and to identify as law the rules produced by such institutions does not fit the international system. To be sure, a complex bureaucratic superstructure has been established since World War II. Much of it can be compared, at least superficially, to the formal institutions of a government such as the United States. The U.N. Security Council and the General Assembly seem to be a bicameral legislature. The Secretariat seems like an executive branch. The specialized agencies may be likened to the regulatory agencies. And there is the International Court.

But the apparent similarity disintegrates under even casual scrutiny. We are predisposed to use the domestic model because its institutions are highly effective. International organizations have relatively little power. Some, such as the General Assembly, were created with genetic disabilities. Others, such as the Security Council, were established with safety valves for the superpowers which soon drained them largely of political effectiveness. And a court that requires the agreement of the parties before it can take jurisdiction is an oxymoron. In sum, the stable correlation between the formal structure of legal decision and processes of effective power found in the United States is not found in the international system. But because efforts have been made to rear a comparable legal "superstructure," there is an appearance of law which can be emotionally reassuring but also perilously misleading.

There are real dangers in transposing the intellectual templates U.S. law students acquire and which are largely appropriate for the U.S. political and legal experience to the international system. Students whose intellectual provenance is an organized and effective national system must painfully unlearn and then relearn the complexity of operation in a decentralized or ineffectively organized system as well as the deficits for understanding and for professional advice concealed in hasty and superficial assumptions of similarity. The need for a different, functional theory of inquiry should be apparent.

Even in organized legal systems, which are characterized by a general convergence of authority and control, key parts of "book law" may fail to approximate the actual normative expectations of effective elites for at least three reasons, each of which is inherent in the very character of law: (1) discrepancies between myth system and operational code; (2) the differential rates of decay of text and factual context; (3) the low degree of specificity in the most fundamental norms in any system. Let us consider each of these briefly.

Discrepancies between Myth System and Operational Code

In all legal systems, much of what is expressed in legal formulae and is attended by signals of authority is not intended strictly to govern, regulate or provide effective guidelines for official or private behavior. This part of the "legal system" conveys aspirations and images, not of the way things are, but the way group members are prone or like to believe they are. The phenomenon is particularly striking in the area of public law. As I stated in *Folded Lies: Bribery, Crusades and Reforms* 15-16 (1979):

The picture produced by control institutions does not correspond, point for point, with the actual flow of behavior of those institutions in the performance of their public function: indeed, there may be very great discrepancies between it and the actual way of doing things. The persistent discrepancies do not necessarily mean that there is no "law," that in those sectors "anything goes," for some of those discrepancies may conform to a different code. They may indicate an additional set of expectations and demands that are effectively, though often informally, sanctioned and that guide actors when they deal with "the real world." Hence we encounter two "relevant" normative systems: one that is supposed to apply, which continues to enjoy lip service among elites, and one that is actually applied. Neither should be confused with actual behavior, which may be discrepant from both.

A disengaged observer might call the norm system of the official picture the myth system of the group. Parts of it provide the appropriate code of conduct for most group members; for some, most of it is their normative guide. But there are enough discrepancies between this myth system and the way things are actually done by key official or effective actors to force the observer to apply another name for the unofficial but nonetheless effective guidelines for behavior in those discrepant sectors: the operational code.¹

In the past century, our science distinguished legalistic expressions that were not prescriptive as *voeux*. It is a concept we need now in many settings beyond the conference but appear to have forgotten. People who seek legal advice plainly require it with regard to both the myth system and the operational code: myth system because it is applied in part by some control institutions, operational code because it is applied by others. Myth system is readily retrievable through conventional research in the formal repositories of law. Operational code, in contrast, must be sought in elite behavior by means not usually taught in law schools.

Differential Rates of Decay of Text and Context

The proverbial decrees of the Medes and the Persians still exist; the context in which they were created and in which they had legal relevance is gone. Whether a

¹Performing legal functions with this in mind and, in particular, interpreting communications from the past, impose very special problems for the responsible legal scholar and practitioner. The praxis New Haven has suggested is hardly radical or unique. Professor Schachter, in quoting from *Nullity and Revision's* conception of the praxis, neglects to mention that the passage which he only partially presented appears under the heading of "Equity." The discussion begins, page 560:

Equity will be understood here as the complex of inclusively prescribed goals, which are rarely formulated in peremptory and conventional legal terms, but which condition all authoritative decision. The most craftsman-like legal decision that controverts these goals, though faultlessly regular by criteria of a narrowly conceived discipline, is nevertheless "splendidly null." Whatever its legal perfection, a decision that fails to take account of minimum and maximum community goals will not be enforceable as an authoritative renouncement. Hence, equity in its broader sense is a factor of effectiveness.

Page 561 quotes, in accord, such *enfants terribles* as Manley Hudson, Julius Stone, Benjamin Cardozo, Dennis Lloyd, John Chipman Gray, and *mirabile dictu* Wolfgang Friedmann. *Id.* at 561 footnotes 8-13. It is curious how often self-declared textualists are careless with texts.

particular exercise of lawmaking seeks to stabilize or change a situation, if it is concerned not with ornamenting myth but with doing what it says it is doing, there must be a minimum congruence between the sociopolitical context prevailing at the time and the sociopolitical presumptions of the legislation. Once legislation is expressed in relatively enduring textual form, however, its rate of decay and change is minimal, while the rate of change or decay of the environing sociopolitical situation will always be greater and may, indeed, be extremely rapid.

Where fidelity to text acquires in itself a symbolic political value, texts whose literal congruence with the sociopolitical situation is less than when they were created may misguide those who would rely on them. At the very least, those who would rely on them may need a validation technique for determining the texts' degree of accuracy, if any. Courts may serve this purpose, but if they themselves and the ambit of their jurisdiction are creatures of the same species of legislation, a functional and noninstitutional test will be required.

Low Degree of Specificity in Fundamental Norms

One of the reasons why literate people do not simply read statutes or regulations by themselves but consult lawyers is that there is no textual guidance for bridging the gap between the relatively general language of the legal instrument in question and the specific details of their own cases.

This is not the place to review the teaching of American legal realism about the deficiency of a rule theory of law. Rules are complementary, they are frequently circular and they are general. Since "basic" norms, as their adjectival complement makes clear, must address a broad range of often dissimilar situations, they often can provide only indistinct guidance in specific cases. Their very generality thus has advantages and disadvantages. Those who must translate those general norms into predictions for specific situation can rely on pure logic only at their peril. Most indicate that they have taken to heart the admonition of one of our great judges that logic is not the life of the law. Since the norms which are still general are, by definition, those which courts have not yet addressed or not addressed in decisions relevant to the choices at hand, some other method of norm specification is required. As for the idea that rules somehow "bind" or "limit" power by some mysterious property they have, one need look no further than the recent judgment in the *Nicaragua* case.

The varieties of community experience in the international system present an even greater professional challenge to lawyers. The law student whose intellectual framework is essentially derived from U.S. experience operates with a conception of community which is more cohesive than many other national communities and certainly much more cohesive than the international one. To be sure, every community is marked by sufficient homogeneity of demands and of conceptions of past and future to enable its members to interact and thus warrant the attribution "community." But there is also enough heterogeneity to require a system of law with effective sanctions to maintain group order. Heterogeneity and the conflict in various forms and degrees it imports are features of even relatively stable and organized national communities.

But the degree of heterogeneity in the international system is especially daunting. The world community is composed of people scattered over some 160 territories with different cultures, classes, castes, language and dialect systems, moralities and belief systems, dissimilar levels of economic development, radically different conceptions of what has happened in the past and what will happen in the future and, frequently, intense and often reciprocal hatreds and distrusts, rooted deeply in their very identities. In such a community, it is difficult to find common symbols of authority, and it is

frequently difficult to identify shared perceptions of common interest. Consider only the problems of bridging the world views of an Islamic fundamentalist in Central Asia with a yuppie in New York, Chicago, Los Angeles or his or her equivalent in Tokyo, Rome, Paris or London.

As long as there is a relative homogeneity of demands for value in a particular community, some lawyers may responsibly view their function as largely the technical and clerical implementation of choices made by the community historically or made by those special organs of government endowed with the exclusive competence to shape policy. And indeed the tendency toward technical conceptions of law flourishes in such systems. But in the international system, this approach, which is available at least optionally to U.S. lawyers when they operate domestically, cannot succeed.

Thus the international system is sufficiently "different" from national legal phenomena to require a comparably different approach to it if scholar and practitioner are to achieve an understanding sufficient to enable them to perform indispensable legal functions. The utility of the intellectual framework developed by Myres McDougal and Harold Lasswell and their associates is that it permits the scholar and practitioner to self-orient in this extraordinarily different and rapidly changing social and political environment and equips them with a set of intellectual tools that facilitate the performance of critical legal tasks that are common to all lawyers but are frequently more challenging in the international system.

It may be useful to set out the New Haven School's approach in broad brush, and to point out some of its specific applications in international work. I will refer to the theory Lasswell, McDougal and their associates have developed as the New Haven School, or NHS, a convenient appellation we owe to Richard Falk.

The New Haven School sees lawyers as experts in making and helping others make rational choices about law. Law, writ large, is a process of making authoritative choices or decisions, including decisions establishing fundamental institutions for decisionmaking themselves. The process format permits the scholar and lawyer to locate and accurately assess institutions, some of which may be endowed with only fantasied power in the actual process of effective decisionmaking. To help lawyers accomplish the tasks involved in this, NHS recommends a set of conceptions and procedures to be used as tools. The conceptions are all commonsensical and relatively simple to state, though often quite challenging to apply.

The first conception arises from the injunction "know thyself." It addresses the need to examine one's standpoint and commitments and, in particular, to scrutinize the psychological and emotional factors that operate on the self. In all social sciences, the ultimate tool for perception and evaluation is the self-system itself. That self-system is affected by culture, class, gender, national group, crisis experience, etc. In the diverse cross-cultural world we have just described, it is necessary for those who wish to operate with people who are animated by radically different perspectives to make sure they understand themselves and the forces operating on and shaping them.

The next injunction is to be contextually realistic: to look at the different processes within which lawyers operate and which they are trying to stabilize or change, as the case may be, and to try to identify the most salient features. Since choices are made about values, "who gets what" in Lasswell's classic phrase, it is important to know what that "what" is, how it is being produced and distributed, and who is getting it.

People struggle for the scarce resources they deem indispensable to life. Legal systems are concerned with arrangements for allocating those desired events or values and also for developing fruitful ways for producing them in greater abundance. Any legal or political system which undertakes, in some degree, to perform welfare func-

tions, must have a way of speaking about these different things or desired events that human beings contend for. Without such a terminology, the lawyer and other decision specialists are constrained either to speak generally and with minimum utility about "things" or to be obliged to spell out in detail the millions and millions of specific things that human beings want. NHS bridges these two positions by using eight empirically referential categories into which those different things may be placed. These categories, developed in a brilliant synthesis by Lasswell, divide the "events" that people want in terms of the following values: power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude. With such a spectrum, it is possible for those performing legal and political tasks to keep in mind the range of things that a contemporary welfare system, such as the international legal one, is concerned with, to identify those institutions which are specialized in the production and distribution of key values, and to be able to make appraisals about the adequacy of the distribution and production of values over time.

In place of an exclusively textual examination of the structures of decision that regulate the production and distribution of power and other values in the international system, the New Haven School insists that a functional approach be pursued, by use of a process model which identifies the participants, their perspectives, the situation in which they interact, the bases of power on which they draw, the strategic modalities by which they manipulate them, and finally the outcomes in terms of the production and distribution of power and the other values which are its perquisites. The utility of a process model is that it permits a constant testing of the actual effectiveness of formal institutions. Thus, to take one example, NHS, rather than assuming that the International Court performs tasks comparable to those executed by U.S. domestic courts, identifies an ongoing process of decision with effective and authoritative outcomes and sees to what extent, if any, the Court contributes to those outcomes. This permits provisional assessments of the degree of effectiveness of the Court, the development of strategic options for an enhancement of its functions, if that is deemed desirable, and, most important, a constant realistic focus on the actual process of decision with which clients must contend and which lawyers must seek to influence. By the same token, a process model permits the lawyer to identify the actual degree of effectiveness of the General Assembly, rather than simply assuming that because it looks like a legislature, it must be some sort of a legislature. Hence it becomes possible to examine what is the actual effect, if any, of the prescriptive function of the Assembly, and, if it is deemed desirable, to devise strategies either to increase or decrease its role in international lawmaking. Without a process model of this sort, the lawyer and scholar fall prey to formal institutional designations which may have very little correspondence with the actual effective power process. The net result all too often is to disable the lawyer from efficiently serving clients' interests in seeking to shape behavior and securing desired outcomes and to skew grotesquely scholarly observations.

Any process of making choices is, of course, complex, particularly in larger organizations. Rather than simply speaking about "decision," NHS finds it useful to identify the components of decisionmaking: the gathering of intelligence, the promotion of policy, the prescribing of policy, invocation of decision when violations of policies appear to have taken place, the application of policy to particular cases, the termination of existing norms and the appraisal of the aggregate performance of the decision process.

This functional breakdown of decision components is indispensable in an unorganized system such as the international one. To take only one example, the international

lawmaking function, which I discussed before the Society several years ago,² simply cannot be comprehended in terms of conventional myth about the national model. It can, however, be usefully and more reliably assessed as a prescriptive process. The same utility is found in study of the termination of norms. One of the features of a decentralized system, lacking effective institutional articulation, is that there is no formal organized way to terminate existing norms. You simply cannot repair to a legislature and ask that a statute be terminated or to a court and ask that a precedent be overruled. In decentralized systems, law is terminated, more often than not, by unilateral claims expressed in or supported by behavior.

The lack of a deep consensus on the basic goals of social order presents international lawyers with problems their domestic counterparts do not encounter. Lack of consensus means that lawyers operating internationally cannot confine themselves to a technical role, but must actively seek to clarify the common interests of the participants they are concerned with and to express those as community goals. This creative function can only be undertaken if it is addressed quite openly and if special skills are refined for its performance. Hence the praxis, to use Aristotle's useful term, of the New Haven School includes in addition to a review of what happened in the past and the conditions that affected it and what is likely to happen in the future, an explicit postulation of goals which can serve the common interests and the invention of alternatives which can increase the likelihood of their realization in future decisions. NHS postulates the goals to which it commits itself as those of a public order of human dignity, in which there is a wide production and equitable sharing of values among all peoples, in which unauthorized violence is restrained and the general expectation of violence is low, and in which there is sufficient institutional structure to adapt to changes and to secure an increasing approximation to the overarching objectives of human dignity for all.

I have discussed some of the unique features of the international political and legal system which distinguish that system from an organized, relatively stable domestic one like our own and then sketched, very briefly, how NHS equips the lawyer to address that system in an effective and professionally responsible way. The critical thrust of NHS is hardly unique. Until today, I would not have thought that American legal scholars seriously believe that a rule conception contributed to understanding or effective operation in the international law, much less that rules have magical properties that enable them to constrain naked power. But much of the general criticism of the orthodox approach to jurisprudence, as Karl Llewellyn put it, "has taken place in prudery, with averted eyes." "It reminds one," he said, "of some Victorian virgin tubbing in a night gown." NHS has organized the reasons for its rejection of the rule approach to make explicit where affirmative contributions were required. In most general terms, the utility of this intellectual approach is that it permits the scholar and lawyer to see law as a secular artifact created by human beings to achieve certain social consequences; it legitimizes and facilitates the appraisal of the legal system in terms of goals and makes explicit the social engineering function of the lawyer.

Criticisms of a jurisprudential method based on guilt by association or on political differences are not entitled even to the dignity of response. Some scholars have tried to mock what they have presented as the daunting complexity of this approach. In fact, much of its intellectual power lies in its comparative simplicity and the extraordinary condensation which its authors achieved. None of the particular tools requires

²Reisman, *International Lawmaking: A Process of Communication*, 1981 PROC. AM. SOC'Y INT'L L. 101.

one to remember more than eight terms or to count on more than eight fingers. Perhaps those who have criticized the theory for complexity may find even this beyond their own resources, but they have missed the point by a large margin.

Life is complex, and anyone familiar with international political life knows that it is extraordinarily so. NHS has developed an economical way of comprehending, addressing and devising strategies that seek to change it. It is not the approach which is complicated. It is the material it must deal with: the international political and legal system on our planet. Any theory which fails to acknowledge and address that complexity misrepresents intellectual inquiry and those who would use it. NHS is not an easy system to apply. This is not the intellectual approach of fast food and those who seek short cuts, who are impatient and who are willing to live in an illusion that the world is simpler, should not look to this method. It requires of those who use it patience, responsibility, a willingness to acknowledge the complexity and difficulty of the problems presented and the courage to make explicit statements of goal.

REMARKS BY RICHARD A. FALK*

Harold Lasswell said in the preface to the excellent book that Professors Weston and Reisman edited to honor Mac that McDougal's influence was distinctive and disturbing. We are all here to celebrate its distinctiveness, but I also agree that it is in some ways disturbing, both on the level that Professor Schachter suggested, and on a deeper level. Let me first say some positive things about McDougal's jurisprudence and its influence.

The New Haven approach is more than the work of this one extraordinary scholar, but a total orientation that has attracted and influenced more than a generation of important participants in this effort to reformulate and rethink international law. Professor Reisman very eloquently and precisely delimited the special qualities of this jurisprudence that have liberated us in a very significant way from the death grip of formalism and positivism that had previously executed enormous influence among international lawyers who were too insecure to acknowledge differences between applying law in an international framework and applying it in a well-ordered domestic system. I refer in particular to the decisive introduction into the thinking about international law of such formatative ideas as context, process, the centrality of values and the significance of systematically appraising the role of nonstate actors, all of which are vital elements in working out a satisfactory jurisprudence in this time in history. I would also like to add a second, more substantive, category of contribution that has flowed out of this work: that is the enormous importance of according such centrality to human rights, human dignity, the normative context and the normative justification for the legal enterprise. It is of great historical importance, in the contemporary world, to emphasize normative considerations. Along with this emphasis, the McDougal depiction of world public order exists at a time when leading governments are poised in a matter of minutes not only to blow up the planet but also to destroy any prospect of survival of the species. In the substantive sense Mac in collaboration with Professors Lasswell and Reisman has done an enormous service by stressing the important connection between the pursuits of international law and the promotion of political democracy as a fundamental precondition for the acceptance of world public order.

The third category of achievement and contribution is that not only has the work been substantively and methodically of great importance at this stage, but also, this

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almost unique presence that Professor McDougal has established as a scholar, teacher, practitioner, and as a human being, has created an inspiring role model that has deeply influenced those of us privileged to be his students at various times. It has encouraged us to look upon our professional identity in a much richer and more satisfying way than we would have done without that kind of experience and exposure. Personally, I am incredibly grateful to him for that kind of shaping influence that goes beyond any message. It is implicit in the medium of the man himself, as a human presence and as an intellectual and spiritual force.

McDougal's stature has often been questioned by rival institutions and rival scholars, but over the years McDougal's achievement has been increasingly recognized in the world, both his impact upon U.S. legal education and as the foundation of an overall American contribution to international law. Two such disparate international legal scholars as Judge Robert Jennings of the International Court of Justice and Julius Stone in the major formulations of their own perspectives single out Myres McDougal for the extraordinary impact his work has had. Jennings and Stone both come from jurisprudential orientations adverse to that of McDougal. This makes their tribute to him even more impressive. Because the power and depth of his work is so considerable, McDougal will transcend all the criticisms made of his work, and its influence will be sustained for a very long period of time.

My fourth category of affirmation, a veiled and deliberately ambiguous one, is what I call the "miraculous element" in the McDougal jurisprudence—that uncanny capacity he has to apply the eight values in a manner that consistently accords with U.S. foreign policy. I am not sure if it is just a matter of prophetic coincidence, or that somehow or other the U.S. Government, no matter which administration is in the White House, has managed to study the works of the New Haven School and assimilated the theory at such a fundamental level that their automatic response to overseas challenges is to promote the values of human dignity no matter what they do. Maybe today McDougal can reveal the miracle of how this coincidence over the years has been sustained with such uncanny consistency.

Now let me turn to more critical comments that I will develop from two quotations. The first is a line from William Butler Yeats' poem, *The Second Coming*: "The falcon cannot hear the falconer." Sometimes I feel that the falcon of McDougal's jurisprudence has lost contact with its originator, the falconer—that there is a kind of absence of correspondence between what the laws say and how they are applied to the realities of the political life by which they are confronted.

The second quotation to which I would refer was made by Attorney General John Mitchell: "Look at what we do, not at what we say." I think that one gets a slightly different image of McDougal's jurisprudence if one looks at what its proponents do, not at what they say, and I think that this is a fair test. The validation of a jurisprudential orientation, particularly if it claims to have this special insight into policy, has to be judged, at least in part, by the series of commitments to controversial policy positions that have been taken by those who stay geographically closest to New Haven. That kind of test is somewhat implicit in the rest of what I have to say.

Due to the constraints of time, I will appear more harsh than I intend with regard to the failure of the falcon to hear the falconer. The first is, in my view, is that Professor McDougal's conception of context is historically inadequate, as he has interpreted the survival agenda of our times in principally geopolitical terms that emphasize a worldwide crusade against communism and that involve a correspondingly insufficient appreciation at the same time of the survival agenda associated with avoiding an ecological, economic and political breakdown of minimum order on the planet.

I know that Mac addresses both sides of this survival agenda, but the overwhelming emphasis, particularly in terms of the attempt to deal with controversial issues, seems consistently to come down on the side of that geopolitical view of what survival means. This connects with the other limitations I see in this specific vision which leads to a misunderstanding of his work in many parts of the world, and that is the absence of any real capacity for self-criticism, *i.e.*, it is good to have your roots in Mississippi, but there comes a time to leave Mississippi as well. Professor Schachter gave up the flag to Mac inappropriately, in my view, when he said that perhaps Mac was more patriotic than others. I believe that this kind of territorial, jingoistic national patriotism as a great disservice to this country at this time. One of the most un-American things recently said by a U.S. leader was Ronald Reagan's ridiculous assertion that the Contras were the moral equivalent of our Founding Fathers.

There is, to be sure, an interplay between law and policy that is a consequence of ideological outlook. Much of the core work of the New Haven School seems to be preoccupied with the East-West dimension of ideological conflict. It was well articulated in Lasswell's and McDougal's *AJIL* article in the 1960s. There they drew attention to the futility of mindless globalism as a foundation of world legal order and correctly pointed out that vital differences in values among democratic, totalitarian and other public order systems precluded universalist approaches at this time. Such an interpretation of ideological conflict facilitated dialogue about what is going on in the world, but it also reinforced a kind of crusader mentality for claims to use force made by those on our side of the main ideological divide known as "The Cold War." Such ideological passion seemed inconsistent with the need for restraint and the renunciation of force in the nuclear age.

The second dimension of ideological space which is inadequately treated by the New Haven School is the North-South dimension of international relations, *i.e.*, the phenomena related to the collapse of colonialism, the rise of the Third World, and the general exclusion of poor people from wealth-sharing processes. The New Haven School has done little to depict a progressive readjustment of relations as expressive of world order values. It has also failed to acknowledge the geopolitical identity of the Third World as outside the main current of power conflict. It is crucial for us to redefine world public order now so as to encourage patterns of global reform and to validate claims of nonalignment and neutrality.

The third position is the most important and the one most disappointingly dealt with by the New Haven School: the relation between the state and civil society in all countries. Notwithstanding the fact that McDougal has contributed immensely to our scholarly appreciation of issues associated with the protection of human rights, the New Haven School has not appreciated clearly the degree to which all sections of all societies are engaged in a struggle by the citizens to control the abuses of governments and to bring the state under the domain of the law and the values of human dignity.

In the 13th century the Magna Carta subjected the king to a degree of law. We need in the world today a Magna Carta for foreign policy and international affairs—we need a revitalization of legal process in relation to matters of war and peace. We must insist that in a democratic society citizens have an enforceable right to a lawful foreign policy.

After World War II three important promises were made to the future. The first appears in the Preamble of the U.N. Charter anchoring world order around "We the peoples" rather than in relation to governments or their representatives. Since 1945, we seem to have forgotten the message in Lincoln's inaugural address that draws the

crucial distinction between popular sovereignty and state sovereignty. McDougal's work has not addressed the demands of popular sovereignty.

The second promise is in article 2(4) of the U.N. Charter, that states will not make unilateral use of force to promote their own interests. All too often international law is converted into a rationalization for foreign policy, and that leads to the debasement of international law. McDougal's great mistake in this regard has been not to separate revolutionary nationalist movements, e.g. decolonialization, from problems posed by the existence of the U.S.S.R. in the world. With regard to revolutionary nationalist movements in Asia, Africa and Latin America, these groups are engaged in largely autonomous struggles that would exist whether the U.S.S.R. existed or not. Until McDougal incorporates this understanding, he will continue to confuse law and policy in Third World settings. This will be unfortunate, not only in relation to those struggling to achieve independence, but for a presentation of the U.S. role, as well. McDougal's partisanship endorses a U.S. role as an historical force that uses its destructive capabilities to oppose the aspirations of non-Western people—aspirations that are comparable in many ways to those that were the foundation of our own reality as a country. We do not have to affirm what comes out of these revolutionary experiences in the Third World, but we should, in deference to our own past and to the legal tolerances connected with self-determination, acknowledge the political autonomy of Third World countries as a reality.

The third is the Nuremberg promise, that leaders of states would be held legally and criminally responsible for upholding the fundamental laws of peace in accordance with the three categories of crimes enumerated at the Nuremberg proceedings. I do not believe that the New Haven School has explored the implications of that promise at all. It is in our interest to have a lawful foreign policy. If we had had a lawful foreign policy we would have been in a much better position overall since the end of World War II. The discretion to use force is self-destructive.

To realize the promise of law and to realize the promise of this liberating jurisprudence that Professor McDougal has helped create, the essential next step is to develop an adequate appreciation of the historical context. Such an appreciation depends upon a detachment from one's own past sufficiently to allow an objective appraisal of U.S. action in the world.

REMARKS BY MYRES S. MCDUGAL*

Professor Schachter, though one of the creators of the policy-oriented frame of jurisprudence, now wavers between that frame and a paradigm of formalistic positivism. He regards international law not as a process of authoritative decision but as a body of rules. He finds that these rules, with only minor relation to their larger community

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context and the fundamental policies they serve, can be applied by a relatively autonomous legal reasoning to achieve stability and certainty in the relations of states. This defies all that the American realists have taught us about the imperfections (complementarities, ambiguities, incompletions) of rules as instruments of communication within national, much less international, processes of authoritative decision. The notion that rules have a “distinctive normative quality,” creating an “obligation” different from the facts of “authority” and “control,” derives from philosophical preconceptions that becloud the factors that in fact affect decision. If legal rules have some reference, syntactic or semantic, other than to policy in the distribution of values among people, that reference remains to be specified.

The context of the larger global community process, effective power and other value processes, of which authoritative decision is part and parcel is not the creation of any frame of jurisprudence. Every feature of the larger community process affects authoritative decision and authoritative decision has value consequences for every feature of the larger process. Any frame of jurisprudence that purports by “autonomous” legal rules to ignore such conditioning factors and value consequences blinds only itself. The world of interacting human beings is in fact complex and interdependent, and complexities and interdependencies cannot be made to go away by false simplicities and closing the eyes to the “undefined terrain of ongoing political decisions and attitudes.” Even when resources for inquiry and scholarship are scarce, asking the relevant questions may be a first move toward realism.

Though a preferred constitutional policy may require appropriate deference by judges to legislative enactments, the distinction between legislation and application, even in national processes, is not that of sharp dichotomy. The “norms” or “secondary rules” that are said to allocate competence between the different institutions of government, even on the national level, have their own inescapable complementarities, ambiguities and incompletions. The practical and intellectual tasks that confront an applier are commonly not too different from those confronting the authorized makers of law. The “precedents, treaties, and established legal concepts” to which Professor Schachter refers are of course relevant, but they are relevant only for the policies they express. The flexibilities of rules allocating competence are well illustrated by the International Court of Justice in the *Nicaragua* case.

It is somewhat surprising that Professor Schachter describes the making of law by the practice of states as “reminiscent of Adam Smith’s unseen hand.” A principal contribution of Grotius was his indication that states could make and apply law, could clarify their common interests, without elaborate centralized and specialized institutions, through a process of the reciprocal making and honoring of their unilateral claims. In this process, as it has operated for several centuries, what one state claims it must be willing to concede to others; it is the imperatives of reciprocity and the potentialities of retaliation that work for the clarifications of common interest and create expectations of future decision. Professor Schachter objects to describing this process as “clarification” and finds that it has a conservative tendency toward protecting the status quo. Whatever its defects, this process offers the most effective, and commonly employed, procedures for the making and application of law presently at the disposal of the global community. It is possible, further, that this process clarifies common interest more responsibly than do centralized institutions that are organized with only casual relation to either democracy or the realities of effective power.

The derision that Professor Schachter pours upon the suggestion of a priority for more fundamental goals and policies would appear contrary to the thrust of the contemporary doctrine of *jus cogens* in the law of treaties. The peoples of the global

community, as of any community, demand different values at many differing degrees of intensity in relation to different problems in different contexts. It would appear only rational that decisions in international law take these different intensities in demand into account. The more fundamental prescriptions, like other prescriptions, of course have their own unique complementarities, ambiguities and incompleteness. Their rational application, again like the application of any other prescription, requires the careful specification of the particular problem in its larger community context and the employment of a range of intellectual procedures (inquiries about trends, conditioning factors, future probabilities, value consequences of options in decision) for the clarification of common interest in relation to the particular problem. It is scarcely necessary for decisionmakers to emulate the fabled jackass who dies because he finds himself immobilized midway between two equally delectable bundles of fodder.

The American Legal Realists, and many predecessors and successors, have established that the alleged certainty and stability achieved by the positivist paradigm is largely illusion. The function that "rules" perform is too often that of the squid that confuses its pursuers by squirting black ink. At the best the function of rules can only be to guide decisionmakers to relevant features of a problem and its context and to appropriate policies. Could it be seriously believed, for example, that the decision of the International Court of Justice in the *Nicaragua* case was compulsorily derived from preexisting rules about jurisdiction that gave the Court no option to consider appropriate constitutional policies? It is not the open, comprehensive and systematic examination of relevant policies, appraised by the criteria of common interest, but rather the worship and attempted employment of the positivist paradigm, that creates arbitrariness, uncertainty and instability. With the goals that he professes, Professor Schachter might himself consider returning to the theories about international law that he helped so constructively to create.

It has already been observed that Professor Falk had an important hand in formulating the theories about international law sometimes described as policy-oriented jurisprudence and that he first attached the label of "The New Haven School." Certainly he is no black sheep who even occasionally bows to the positivist paradigm. The difficulty that some proponents of a policy-oriented frame have with some of his work relates not to his jurisprudential frame but to his perception of the facts of the contemporary global process of effective power. These critics agree with Professor Falk that the role of the nation-state in the world arena is diminishing and that other group participants are becoming important. Among such other participants, however, they observe two contending systems of world public order. One of these systems, whatever its defects, at least aspires toward a world public order of human dignity in which values are widely shaped and shared; a second system is avowedly totalitarian, building upon a concentration of values and with "human rights" vested in the state rather than individuals, and is violently expansionist.

Professor Falk apparently does not see this distinction so clearly and finds the first system as oppressive of human dignity and as expansionist as the second. He aspires toward a world law, in some new and emerging paradigm, that would reconcile these two hostile systems. When law is considered as a process of decision that clarifies and secures common interest, it is difficult to see what the detailed content (beyond the survival of humanity and the protection of the global environment) of such a reconciling law might be. The human rights of the individual human being, which are of so great concern to Professor Falk and many of us who see hope in the first system of public order, could be made to go down the drain. The notion of a neutral law, a law

without policy content, is a delusion. The challenge to Professor Falk is to specify, problem by problem, the detailed content of a law that expresses the values of both totalitarianism and nontotalitarianism. It is to be hoped that it will be a law with which those who cherish the values of human dignity can live. The U.S. Government, as the government of the community that is a principal exemplar of a public order aspiring toward human dignity, is not always wrong. The overriding challenge to all of us is to invent, and promote the adoption of, the strategies, structures and processes of decision that may serve to move an imperiled world as securely as possible toward a public order more expressive of human dignity.

DISCUSSION

BENJAMIN FERENCZ* was concerned about finding ways for bridging the gap between the different points of view expressed by the panelists, noting Professor Reisman's statement that international affairs could not be treated as national, domestic affairs. But why, he asked, could the national model of clear laws, courts and enforcement not serve as a goal to be sought in international affairs? He was concerned because the two fundamental approaches of the world ideological rivals—respect for human dignity and totalitarianism—seemed to be irreconcilable. Since all individuals ultimately crave human dignity why should citizens rely solely on governments which seemed to be leading people to clash on this point; rather, should one not go beyond the contemporary decisionmakers to educate the public itself where the common desire for peace would be the overwhelming force to bridge the gap between the two points of view?

A speaker from the floor asked Professors McDougal and Reisman if they thought that the New Haven approach served as a theory of domestic judicial review, and if so if they could indicate cases in the domestic legal system where application of it would lead to an undesirable outcome. He referred to John Hart Ely's *Democracy and Distrust* (1980), which had postulated that it was not possible to shape values in the United States.

DAVID KENNEDY** directed his comments to Professors Schachter and Falk, expressing his concern about the New Haven discipline's traditional power for international legal scholars who might be thought of as centrist in their orientation. McDougal had been presented in the panel discussion as an outsider challenging the discipline. If one were an unreconstructed formalist, there would be no question that the issues which McDougal and his associates had been presenting for a long time presented a threat to the discipline. But from the center of contemporary international legal scholarship, it seemed unlikely that a school so associated with establishment social engineering and the status quo could be that threatening. Was there any doubt that in fact formalism and the New Haven School were the great cornerstones of contemporary international law scholarship? Scholars of the center seemed to have been scurrying endlessly between them for a generation, trying to weave and blend contextual values, role fealty, procedural neutrality, functionalism and so forth. Perhaps those in the center should begin to see the New Haven School as neither a threat nor a foundation but as one of two prison bars on our imagination. Rather than using them over and over to define the difference between municipal and international or

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between law and politics, perhaps we should search for a different set of problematics within which to situate our scholarship.

CHARLES W.T. STEPHENSON* directed his questions to Professor Reisman. As the process of the New Haven School developed one could observe some resistance to its value-loaded aspects. If one removed those, one found under them a metalanguage; one could translate from ordinary discourse to a new set of words, categories and formal operations. From there one could descend back to normal legal language. This had two virtues. When one went to the concept of decisionmaker from the judge, jury or executive, one lost some of the intellectual static which accompanied these terms. One might also find one could piggyback another level of analysis upon that, by grouping. He wondered if there was a trend to turn back to the structural aspects of the approach.

A speaker from the floor stressed his understanding that the policy-oriented approach was international in scope, not just an American domestic dialogue. He agreed with Professor Falk that the law of human dignity must embrace all peoples. One must not always set the opposing systems apart; such practice was not defensible intellectually or practically in today's world. One must recognize the continual process of change which characterized even the most evil systems. All was not black and white.

Professor REISMAN remarked that the New Haven approach was not intended to yield a single answer but that the outcome was dependent upon different goals and contexts. Professors Falk and McDougal seemed to differ on the question of values. One was not faced with a problem regarding the utility of a jurisprudential methodology, but with a disagreement about human dignity values.

Professor FALK believed that the method of jurisprudence could not be divorced adequately from appreciation of the context. It was not a matter of taste, or perception, but of empirical validity assessing the most important changes going on in the world in the face of objective dangers of survival. To suggest that one promoted human dignity in one's support of the elites in Central America was not within the domain of reasonable differences of opinion. One posited Soviet demonology in every Third World arena as justification for killing and supporting gangsters in the name of helping the Contras. This was really the essence of this discussion; one must deal with this historical context at the same time one dealt with jurisprudential method.

This issue of irreconcilable world order systems must be discussed in a more sophisticated and refined way. One must say, irreconcilable in what respect, and reconcilable in what respect. Evil was on both sides. One had been using a geopolitical abstraction to institute foreign policies that were damaging in the context in which they are applied.

Professor MCDUGAL responded to the query concerning how his jurisprudence could contribute to constitutional interpretation in light of Ely's conclusions. From his perspective Ely was simply wrong. Ely, when stating that there were no values to guide interpretation, was seeking a derivational, rather than a factual or historical, base. The values of human dignity had been cherished by some for at least 5,000 years and were especially cherished within the United States. Professor MCDUGAL would refer to his 1978 Cardozo lecture to the Association of the Bar of the City of New York to answer Dean Ely.

In response to Mr. Ferencz's question, Professor MCDUGAL responded that the New Haven school sought the same policies at global and domestic levels. It was

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concerned with the values of individual human beings on a global scale; it was the same whether one dealt internationally or nationally.

Finally, Professor MCDUGAL addressed the issue Professor Kennedy had raised in describing formalism and the policy-oriented approach as opposite pillars. Professor MCDUGAL did not know exactly what the critical legal studies people were talking about. Professor Duncan Kennedy, in the preface to the bibliography in volume 94 of the *Yale Law Journal*, had said that the critical legal studies movement had no goals and no method. Then, what did the movement have? He wanted to know what alternatives Professor David Kennedy proposed, and he wanted to understand exactly what he was saying.

PAULA WOLFF*
Reporter

HUMAN RIGHTS V. NEW INITIATIVES IN THE CONTROL OF TERRORISM

(Cosponsored by the International Association of Penal Law, American Branch)

The panel convened at 3:00 p.m., April 26, 1985, M. Cherif Bassiouni** presiding.

INTRODUCTORY REMARKS BY THE CHAIRMAN, M. CHERIF BASSIOUNI

“What is terrorism to some is heroism to others or when it suits my political purposes it is heroism otherwise it is terrorism.”

Terrorism has been defined as “a strategy of violence designed to instill terror in a given population in order to achieve a power outcome or to coerce a government to act contrary to its policies and practices.” Under that definition terrorism can be categorized five ways:

1. By states against their own populations to preserve a given political regime. Almost all dictators have resorted to it as have a variety of dictatorial regimes. Hitler’s genocide of the Jews and Gypsies, and the mass slaughter of Slavic people, resulted in millions of casualties between 1933 and 1945. Since then there have been countless other casualties around the world.
2. By military forces against occupied civilian populations. Almost every conflict in history has examples; Germany’s World War II “war crimes” and “crimes against humanity” lead all other instances. More recently it occurred in Vietnam (by all sides to the conflict), in Lebanon (by Israelis and various Lebanese factions, e.g. the Sabra and Shatila massacre), in Cambodia (by Vietnamese), and in the occupied territories of the West Bank and Gaza (by Israelis).
3. By one or more opposing groups in a multiracial, multireligious, or multiethnic society where political and social institutions have failed to allow these diverse groups to pursue their coequal rights. That is the case with civil wars and sometimes secessions. In the 1960s Biafran secessionists in Nigeria were crushed, and an estimated 1 million persons were killed. In the 1970s the Bengalis seceded, and Bangladesh was created out of Pakistan, but only after 1 million were killed before India intervened militarily. Ireland, Cyprus and Lebanon are still in the throes of such conflicts. Claims of national liberation within this category abound: the Spanish Basques, the French Corsicans and certainly the Catholic

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