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# MYRES MCDUGAL — AN APPRECIATION

OSCAR SCHACHTER\*

What a happy thought — though not at all surprising — for a new student journal of international law to dedicate its inaugural issue to Professor Myres McDougal. As one who has benefited immensely from an intellectual and personal association of long standing with Professor McDougal, I am delighted to find new evidence of the esteem in which he is held and, especially, of the influence of his ideas on students interested in international law.

These ideas are not easy to sum up in a few words — they are, as befits the subjects, complex, subtle and wide-ranging. They incorporate concepts and insights from many disciplines and they demand close and serious study. But one need not master the complexities to appreciate the grand scale of McDougal's and Lasswell's intellectual conception of international law as a powerful and realistic instrument for human betterment and to realize why it has stimulated so many international lawyers, of varying background and outlook, to break new ground in their approach to the concrete subjects of the profession.

It has been remarked by Kierkegaard that builders of great systems are like men who erect a great castle and live in a small hut next door. But one cannot think of McDougal as living in a small hut. On the contrary, he has occupied the great castle, rallying to his cause those who share his profound moral concerns and his belief in rational disciplined inquiry. He has invited intellectual battle by vigorously assaulting rival theories and by puncturing the platitudes and undermining the assumptions of established doctrine. His scorn has been meted out equally to the learned technicians who lose sight of important goals and to the idealists who remain on the level of generality and pious hopes.

Appealing as this may seem, it cannot be said that his cause has swept all before it. There are more than a few — both in and outside the profession — who regard his central conception of a "policy oriented" international law as profoundly mistaken, indeed as 'vain' and 'arrogant'. In their view, neither the qualifications of the lawyer nor the structure of international society warrant placing the jurist in a significant and explicit political role. They fear that by stepping outside of a rule-oriented approach and the sanctioned sources of interna-

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tional law, the way is opened for arbitrary or partisan decisions which express the preferences of the decision-maker rather than the policy of the relevant community.

What is most persuasive in McDougal's response to the criticism is his impressive unmasking of the pretensions of traditional rule-oriented analysis as objective and value-free. His voluminous works demonstrate with characteristic vigor and abundant examples the extent to which the jurist in one capacity or another, faces inescapable choices involving alternative 'policy' preferences. To purport to resolve such issues on the basis of semantic analysis or historical precedent is a snare and a delusion. It obscures and often confuses the questions of central concern and it permits arbitrary or subjective preferences to be presented as mandatory objective conclusions. That this may serve, in some measure, professional interests or sustain authority is acknowledged by McDougal but he regards such pseudo-objectivity as transparently misleading and, more important, as obfuscating the process of rational inquiry that should be the essential feature of international decision-making.

The more difficult and challenging task faced by McDougal is to demonstrate in a positive way that the jurist can resolve conflicts of interest and ideology on the basis of manifest "policy" of the community grounded in the expectations and common interests of all of the relevant participants. McDougal is of course aware of the complexity of this task. He knows, as Lasswell has put it, that one cannot assume that universalized rhetoric means universalized conduct or expectations. To determine international policy in the face of conflicting demands and ideologies, one needs to look beyond and beneath the generalities of international rhetoric and the self-serving declarations of national states. Easy formulas are not available but McDougal and Lasswell have done much to show that the process of ascertaining common interests and policy can be pursued realistically through systematic examination of goals, conditions, strategies and consequences. Their massive studies on the oceans, outer space, the use of force, and others show how this might be done. Whether or not one is persuaded by their conclusions in particular cases, the significant aspect is the method of disciplined inquiry and explicit rationality for reaching conclusions.

As one who has in his professional life as an international official been especially sensitive to the dangers of partisan positions being presented as legally objective conclusions, I can warmly applaud the effort to eliminate a covert subjectivism

and to develop a disciplined approach to ascertaining as objectively as possible the priorities and policies of the community of states. The fact that this may not always be possible to do is not a sufficient reason to abandon the effort and resort to hocus-pocus of verbal incantation.

One of the liberating and exhilarating features of the McDougal-Lasswell approach has been the systematic way in which it has related law, social phenomena and basic values. It has moved international law away (on the one side) from verbal dialectic, and (on the other) from the 'ad hoc' case by case approach which passes for pragmatism. It is an approach which requires relating events to their causes and consequences, the particular case to the general goal, the part to the whole, the rule to its function, the whole process to the basic purposes and values of mankind. This is in sharp contrast to the thinness of legal positivism with its essentially 'status quo' orientation. The McDougal approach enables one to see international legal processes among the major instruments of change, even of fundamental change, and to employ law purposively and rationally to eliminate the constricting effects of a narrow parochialism in the interests of a more just and decent world order.

This, stated far too briefly and crudely, is what I find in the contribution of Myres McDougal and it suggests why I regard him as a towering and inspirational figure in international law. The editors of *The Denver Journal of International Law and Policy* have every reason to congratulate themselves on their selection.