

Denver Journal of International Law & Policy

Volume 1
Number 1 *Fall*

Article 8

January 1971

Myres S. McDougal: Pioneer for the Year 2010

Richard A. Falk

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Richard A. Falk, Myres S. McDougal: Pioneer for the Year 2010, 1 *Denv. J. Int'l L. & Pol'y* 13 (1971).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, digitalcommons@du.edu.

Myres S. McDougal: Pioneer for the Year 2010

Keywords

Human Rights Law, International Law: History, Legal Education

MYRES S. McDOUGAL:
PIONEER FOR THE YEAR 2010

RICHARD A. FALK*

Writing against the bloody mainstream of our history, Myres S. McDougal has dedicated his life to a demonstration of how law might contribute to a more valuable human existence at all levels of political organization. In this brief comment I shall confine myself to his contributions to world order studies, the area wherein Professor McDougal has concentrated his efforts for more than twenty years and a subject matter wherein the relevance of law seems to be persistently put in question by the words and actions of statesmen.

The central endeavor of Professor McDougal, and the impressive array of first-rank scholars who have joined in the enterprise form what might be designated "an intellectual collective" which I have labeled elsewhere as the "New Haven approach,"¹ has been to demonstrate that international law is useful if appropriately conceived² and that international law is used, whether wittingly or not, by decision-makers trying to balance assertions of self-interest against probable counter-assertions in a way that is mutually satisfactory. In this respect, the case for normative relevance ultimately rests in our historical period on the universal need to discourage the kind of violence that might generate recourse to nuclear weapons. McDougal's writings have been sensitive to this overriding consideration, as well as to the conflicting tendencies among principal states for world dominance. In this respect, McDougal's writings presuppose the beneficial influence exerted by the United States and allied liberal democracies upon foreign societies and the correspondingly detrimental influence exerted by the Sino-Soviet group of actors denominated as "totalitarian."³ As such, the central tension in McDougal's thinking is between the universalistic criteria of world order and the particularistic criteria of American foreign policy. By historical circumstance,

* Milbank Professor of International Law, Princeton University.

¹ See R. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* 342 (1970); Gidon Gottlieb has reached the same kind of judgment under the rubric of "the Yale approach". G. GOTTLIEB, *The Conceptual World of the Yale School of International Law*, *WORLD POLITICS* 108 (1968).

² It is more accurate to conclude that McDougal and his associates have recast the traditional perspectives of "international law" in a more broadly conceived framework of "world public order."

³ This element in McDougal's thinking is made particularly clear in McDougal and Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, in McDougal et al. *STUDIES IN WORLD PUBLIC ORDER* 3-41 (1960).

in part, there is increasing evidence that the course of American foreign policy is not compatible with any adequate conception of world order, even one that is modest in its assertion of constraints.⁴ America's involvement in the Indochina War has exposed vividly—what was latent all along—that international struggles could not be divided for normative purposes by reference to the ideological affinities of the contending factions. For one thing, the anti-Communist faction might be repressive and totalitarian; secondly, the Communist faction may derive its strength from nationalism and socialism rather than from the sort of bureaucratic totalism we associate with the Soviet Union and its satellites; thirdly, if the ratio of forces is strongly against the anti-Communist side it prompts highly destructive reliance on a military strategy to reverse a political defeat; fourthly, if the setting of struggle is a low-technology society, then the intervention of high-technology weaponry almost necessarily ravages the country if the Communist-oriented faction has a firm base of popular support. These factors are all present in Indochina and have increasingly led international law critics to shift the discussion from a debate on norms to an inquiry into personal responsibility for the commission of war crimes in a Nuremberg sense. Telford Taylor's book, *NUREMBURG AND VIETNAM: AN AMERICAN TRAGEDY*, represents a sober but decisive acknowledgement that the American response to Communist challenges in Indochina culminated in a *course* of conduct, not isolated acts, that was *criminal* and that implicates American decision-makers at the highest levels of civilian and military command.⁵ From an international lawyer's perspective such criminality represents a decisive demonstration that American foreign policy—even if oriented toward resisting the expansion of Communist influence—is not necessarily compatible with adherence to minimal imperatives of world order.⁶

⁴The most significant attempt to argue the contrary position has been developed by Professor John Norton Moore, a scholar deeply and visibly influenced by his association with McDougal, in an influential series of articles. For a recent example of his approach see Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, 65 AM. J. INT'L L. 38 (1971).

⁵Neil Sheehan, writing a long essay review in the Sunday *New York Times Review*, concluded that "If you credit as factual only a fraction of the information assembled here about what happened in Vietnam, and if you apply the laws of war to American conduct there, then the leaders of the United States for the past six years including the incumbent President Richard Milhous Nixon, may well be guilty of war crimes." N.Y. Times, Mar. 28, 1971, § 7 (Magazine) at 1, col. 4; for an effort to apply the war crimes reasoning succinctly to the issue of impeachment see R. Falk, *Why Impeachment*, THE NEW REPUBLIC, May 1, 1971, at 13.

⁶And may not, indeed sustain the integrity of legal process within the domestic polity. The government reliance on vague conspiracy indictments to prosecute anti-war activities is one indication of domestic spill-over from an international course of lawlessness.

I hope that Professor McDougal will feel the need to reformulate some of his analysis in light of the Indochina experience, although it is of greater consequence for a potential biographer than for future students of world order. I find it remarkable that, despite my disagreements with McDougal on levels of policy application, I find his basic orientation to the subject matter of world order studies as valuable as ever.⁷ The shortcomings of his analysis involve, in my judgment, errors of historical interpretation both with respect to the values actually animating American foreign policy and as to the world setting, but these shortcomings do not undercut the effort to achieve a comprehensive view of world order, oriented toward the achievement of human dignity and conceived in the dynamic mood of process.⁸

In two crucial respects, I think recent developments have proven McDougal even more correct than earlier: first, shifting attention from the traditional concern with "international law" to the wider domain of "world public order;" secondly, insisting for reasons of pragmatic and ideological necessity that the foreign policy process be governed by a secure normative framework.⁹ Both of these achievements have, in my judgment, great consequence for the survival potential of world civilization, and as such, rank among the prime successes of humanistic studies in our times. Suppose we assume that by the year 2010 there exists a world system that has generally overcome the fundamental challenges of war, poverty, pollution, and

⁷ In actuality, McDougal has devoted comparatively little of his scholarly energy to supporting his interpretation of the current world political scene. Among the more important examples of scholarship responding to current issues are M. McDOUGAL & N. SCHLEI, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, STUDIES, *supra* note 3, 763-843; McDOUGAL, *The Soviet Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963); McDOUGAL & GOODMAN, *Chinese Participation in the United Nations: The Legal Imperatives of a Negotiated Solution*, 60 AM. J. INT'L L. 671 (1966); McDOUGAL, *Foreward* in R. HULL & J. NOVograd, *LAW AND VIETNAM* vii-ix (1968).

⁸ In contrast to the static mood of structure; of course, a total understanding partakes of both moods, and McDougal's thinking is sensitive to this necessity.

⁹ In this sense, McDougal confronts directly the Kennan-Morgenthau-Acheson critique of legalism in international relations. For a recent instance of where this critique has been carried particularly far, presenting an extreme set-off against normative-prescriptive ways of approaching international relations, see M. COPELAND, *THE GAME OF NATIONS* 19-26 (1969).

oppression.¹⁰ A biographer trying to recreate the intellectual roots of such a positive outcome could hardly do better than to explicate the life and work of Professor McDougal, whose clarity of vision, seriousness of commitment, and extent of impact towered so far above his contemporaries as to be virtually invisible. In this sense, of norm-oriented thinking about the future, without succumbing to the easy diversion of utopianism,¹¹ McDougal is without peers.

¹⁰ If these dramatic aspirations are not substantially realized by the year 2010, then it is highly likely that processes of decay and distegration will culminate in some planetary catastrophe of an irreversible character long before that date. In *THIS ENDANGERED PLANET* (1971) I argue that future world order depends on the directions of dominant consciousness that come to prevail in the next few decades, and that the outcome will result in either dramatic improvement or failure. The alternative lines of positive and negative development are outlined in plausible sequence in Chapter IX, 415-437.

¹¹ Note, however, that the design of credible utopias, especially if accompanied by implementing strategies, is a highly creative and constructive intellectual exercise.