creep into deliberations within the United Nations. This is an attraction to many scholars from the long-established states. It may also prove to be attractive to jurists from the developing nations as well.

JOHN N. HAZARD

INTERNATIONAL LEGAL ORDER: ALWYN V. FREEMAN vs. MYRES S. McDOUGAL

There is a tendency to discuss which approach to international legal studies is the correct one. This produces rather sterile arguments by advocates of one approach against those of another. Such polemics overlook the important fact that the main established approaches all serve a useful function, and that this usefulness normally accounts for their existence. In this respect, the polemics for and against Kelsen or McDougal or Tunkin are mainly unnecessary and misleading. They create the impression that one contemplating the use or study of international law is confronted by a mutually exclusive choice; that there exists an either/or situation in which one must make a clear commitment to one approach and reject its competitors; and that if one, for instance, admires Kelsen, one must look askance at McDougal and vice versa.

On way to avoid this necessity for choice is to recognize that each particular approach has its own set of intellectual objectives. If we do this, our next task becomes to classify the major approaches according to their objectives. This will put us in a better position to select for a particular purpose the approach with the intellectual objectives that most clearly coincide with our own. It seems clear that an international lawyer may be interested in any one of several things. It is one thing to seek guidance as to the content of relevant rules and standards when advising a client about the extent to which international law presently offers protection against the risk of expropriation of property held abroad. It is quite another to ascertain the effectiveness of the existing rules and procedures for their enforcement. It is still different to emphasize those rules and procedures that should be brought into existence to sustain the international economy at optimum levels. And it is quite something else again to discern what rules of international law should apply to the protection of foreign investment, given a certain set of national attitudes toward the status of private property; this last is one of the central challenges confronting international lawyers writing from a socialist perspective. It is further different if one adopts a systemic outlook and tries to consider expropriation norms in light of a need for international law to achieve a proper balance between national prerogative and world community welfare. And, finally, the problems are quite different if one investigates the problems of expropriation primarily to gain insight into how international law works, rather than to receive guidance as to its doctrinal content.

Each of these inquiries reflects a genuine intellectual need. Each reflects a predominance of certain interests over others. Each tends to ex-

press one jurisprudential outlook more than others. But it is an otiose exercise to excoriate some as guilty of the debasement of true international law, and to exalt others for giving it true expression. This is not to deny that the philosopher of international law can make useful criticisms of the theoretical foundations of each approach and thereby increase its potential validity and usefulness. In fact, an accurate understanding of the objectives of a particular approach is a necessary preliminary to useful criticism. For only then can we accept the approach on its own terms.

Once we have satisfied this initial requirement, a critical examination of the thought of leading international lawyers can make two useful contributions. First, it can make us more aware of the particular objectives emphasized in their work so that we can grow more sophisticated about why and when to consult whom. At the same time we will be rescued from the barrenness of trivial debates such as whether the Harvard or Yale approach, assuming either exists, provides a superior method for the study of international law. Perhaps we can be taught to clarify the debate by pointing out that no over-all choice need be made. This will encourage a more constructive discussion among international lawyers and release the more passionate from the chore of organizing crusades against the heretical.

If this first contribution can be made, then a second becomes possible—namely, constructive criticism of a specific approach to international law having explicated its major objectives and having discerned its animating outlook. In this respect, one can point out that a given thinker on his own terms is inconsistent, unconvincing, or incomplete. I have felt, for instance, that Myres McDougal has never done a very good job of reconciling his support for the legality of the use of force by Western states in cold war contexts with his more general plea for a system of minimum world order premised upon the acceptance by *all* states of certain *common* restraints.

In the July issue of the JOURNAL, Alwyn Freeman offers constructive criticism [1] of McDougal and Feliciano's *Law and Minimum World Public Order*.[2] The criticisms offered are coupled with many comments praising the authors for their achievement. However, in my view, Mr. Freeman's principal criticisms of McDougal-Feliciano are unwarranted, and require response, as they deal with important issues of form and content. I am provoked to write, in part, because Mr. Freeman's criticism seems to stem from certain attitudes toward contemporary international society that I regard as dangerous and regressive. One feels a certain reticence about bringing differences in political valuation out into the open in a scholarly journal. But I think this reticence is unwise, especially when the discussion involves the validity of McDougal's approach, an approach that devotes itself so centrally to the use of law as an instrument for the realization of the values of human dignity. Freeman's editorial is initially im-

[1] Freeman, "Professor McDougal's 'Law and Minimum World Public Order,'" 58 A.J.I.L. 711 (1964).

[2] McDougal and Feliciano, Law and Minimum World Public Order (1961).

portant because it makes clear that even among Western international lawyers as sympathetic with one another as Freeman and McDougal are, there is, nevertheless, considerable room for controversy as to the specific content of the values of human dignity.

So much by way of introduction. The remainder of my comment will consist of a response to three principal criticisms made by Mr. Freeman of the McDougal-Feliciano study: First, that the authors are not sufficiently alert to the damage that has been inflicted upon the international legal order by allowing the newly independent states of Asia and Africa to participate as full-fledged members; second, that McDougal's mode of analyzing international law could be made more effective if the language were simpler and the categories fewer; and, third, that McDougal-Feliciano-Lasswell lend their good names to an image of world community that appears to reflect socialist rather than Western values, given the present stage of international relations.

(1) *The New States.* After praising McDougal and Feliciano for the over-all realism of their outlook, Freeman criticizes the book for giving "too little weight to the devastating inroads which the myth of universality has chiseled into the very foundations of traditional law" (p. 712). Freeman goes on with gathering passion to proclaim that

> some, it is true, appear to regard this as a good thing; but a complete evaluation *must* impeach the practice of admitting into the Society of Nations *primeval entities* which have no *real* claim to international status or the *capacity* to meet international obligations, and whose *primary congeries* of contributions consist in *replacing* norms serving the common interest of mankind by others *releasing* them from inhibitions upon irresponsible conduct. (p. 712. Emphasis added.)

No examples are given. Freeman says that these new states have been "aided and abetted by the so-called socialist states," and concludes with the assurance that "an undignified compulsion to admit these new entities as full-blown members of the international society upon achieving 'independence' has impeded, not advanced, the emergence of a mature code of conduct" (p. 712). Freeman's breath-taking rhetoric is an attack, it must be recalled, upon the failure of McDougal and Feliciano to give attention to the problem.

But let us consider what attention, in Mr. Freeman's vein, would entail. These new states are, one presumes, those nations in Asia and Africa that have achieved independence since the end of World War II. Prior to independence these states were mostly governed as colonies of the great imperial Powers of Europe. What is it that is wrong with these states? Why are they primeval entities? In most cases, internal order has been achieved in a society that is busy modernizing itself and is, at the same time, rediscovering its earlier indigenous cultural traditions that had been suppressed during its term as a colonial dependency. Often these countries are poor and must rely upon an élite that has had relatively little education. The economy has been generally distorted to serve the interests of the former colonial master, and often much of the wealth and wealth-pro-

ducing activity remains in the hands of nationals of the colonial Power or their friends among the native population.

These nations are generally resentful about their long period of foreign oppression, and there is an understandable, if unfortunate, tendency for them to be dubious about a system of international law that legitimated the colonial relationship and gave legal protection, in the form of exterritoriality and capitulatory regimes, to the privileges extorted by their foreign overlords.

The aggregate leadership of the new states represents a combined population that is almost half of the world's total. Why should not international law be revised to take account of their particular interests? Why should the traditional "code" be satisfactory for an international society that is so altered in composition? Why are not even the "so-called socialist states" (Freeman's phrase) entitled to influence the content of modern international law? Can we be so proud of such Western and "civilized" states as Hitler's Germany, Mussolini's Italy, Franco's Spain, or Duvalier's Haiti to permit ourselves to make in good faith the invidious repudiation of the new states or the socialist states? Is Indonesia's aggressiveness or India's coercive settlement of the Goa dispute out of line with the behavior of aggressor states in the West? Does not the continued reliance upon force by the great Powers which find their vital interests challenged suggest that the Afro-Asians are not alone in their unwillingness to have vital interests foreclosed by the rules of international law developed to prohibit recourse to force?

What, then, would Mr. Freeman have McDougal-Feliciano say about the emergence of the new states? One supposes that he longs for more rigorous standards governing recognition practice and admission to the United Nations, as well as for an insistence upon adherence to traditional rules of state responsibility and duties of protection toward foreign investment; in other words, he seems to counsel greater fidelity to the old order. One way to achieve this greater fidelity is to deny states legal status in international society unless they give evidence of their intention to abide by the old order. If access were so restricted, then the myth of universality about which Freeman complains would no longer hold sway. Evidently the main attribute of the myth, a not very mythic attribute, is that political entities with the factual characteristics of a state qualify for membership in international society regardless of their domestic political orientation or their foreign alignments. The continuing ostracism of Communist China from the United Nations illustrates an inroad on the myth of universality, an inroad achieved at the expense of the most populous state and the seat of the oldest and one of the most glorious of all civilizations.

It seems unfair to criticize McDougal and Feliciano on this account. In fact, one might well make the opposite case more persuasively; namely, their failure to consider what changes in international law are appropriate to take account of the values and interests of these new members of international society. In any event, one of Freeman's persuasions has the duty

to come forward with a more specific set of allegations and rectifying proposals. In the absence of such specificity it seems irresponsible and unfair to use such hostile language to describe the impact of the new states of Asia and Africa upon the conduct of world affairs. It should be kept in mind that these new states have consistently supported the peace-keeping operations of the United Nations, and have been a source of moderating influence on those occasions when disputes among the great Powers threatened to produce large-scale violence.

(2) *Simplification.* It is often said that McDougal presents his ideas in an obscure jargon that impedes comprehension and adds nothing of substance. Critics call for clear and simple formulations, and complain about his murky sentences and numerous categories. Freeman echoes this standard line of criticism when he writes that "one can still admire the intellectual resources brought to McDougal's scholarly conceptualism of law as an instrument of social and humanitarian will, without approving unqualifiedly the abstruse formulation of principles enunciated" (p. 715). Freeman observes that "the structural idiom occasionally overpowers the living thought of which it is the skin," and reminds us that "the unwary may not grasp readily the prolix esotericism enveloping the legal submissions" (p. 715). Freeman's own prolix esotericism envelops his submission in such an accusation as this: "Simple ideas are sometimes expressed in a framework which so cloaks the substance that the dialectic casing, the vehicle, blurs the focal points of concentration."

But let me not stray. Freeman does express a criticism of McDougal's writing that is frequently made, especially by those who privately concede that they have not really had the time or the patience to read very much of his work. One supposes that it is much more reassuring to reject a difficult author's books *ab initio* than to do so after a careful reading.

I would argue that the stylistic criticism is unfounded. McDougal strives to achieve clear and precise expression. His sentences are almost always impossible to improve upon. Their complexity stems from an insistence upon nuance and accuracy, not from an infatuation with German metaphysics, or some inborn quality of verbal ineptitude. McDougal, with the substantial help of Harold D. Lasswell, is engaged in the formidable task of developing and applying a jurisprudence that takes *systemic account* of all aspects of social reality relevant to the processes and structures of making *rational* decisions about legal policy alternatives. This is a complicated endeavor and requires an elaborate intellectual apparatus. It would not occur to anyone to complain about Einsteinian theories of physical reality on the ground that they were abstruse and not readily susceptible to lay understanding. Well, it is time that we appreciate that theories about social reality are also likely to be comparably complicated if they are to render service. Our expectations seem quite wrong. Why should a reader be entitled to grasp McDougal's ideas on international law without special effort and training? We confront an insidious form of anti-intellectualism whenever we meet the argument that legal analysis must be carried on in a fashion that requires its meaning to be evident

to the uninitiated or hurried reader. All that it is proper to demand is that legal analysis bring added knowledge and understanding to the adept. McDougal and Feliciano over-fulfill this demand.

(3) *World Image.* Finally, Freeman questions Lasswell's advocacy, in an introductory chapter, of a non-provincial world view, one that is released from what he aptly terms "the syndrome of parochialism." Parochialism in world affairs leads nations to pursue egoistic ends at the expense of other actors. This has always been the case, but today it creates prospects of mutual destructivity on an unprecedented scale. Thus, McDougal and Lasswell contend that rational self-assertion requires men to identify increasingly their fulfillment with the welfare of political units larger than the state. Such a prescription tends to deprecate the rôle of the state in the global value-realizing process. It also supports, by implication, the growth of supranationalism. This so offends Freeman that he is led to ask "Would it be legitimate to inquire whether the achievement of a 'self-system larger than the primary ego; larger than the ego components of family, friends, profession or nation' (Lasswell's introduction, p. XXIV) is, at this writing something more akin to a socialist philosophy than that of the Western World?" (p. 716). It is ironic that two such staunch defenders of the Western conception of human dignity against the socialist attacks from the East, as are McDougal and Lasswell, should stand accused of embracing a socialist world image.

Does Mr. Freeman really concede that socialists are more advanced than others in their conception of world order? Or that the effort to supplant the nation as the primary organizing unit in world affairs is somehow "socialistic?" I fear that Freeman's bias here, as with respect to the new states, is to favor retention of traditional ideas about the actual and desirable pre-eminence of the sovereign state in the international legal system. One wonders under what conditions Mr. Freeman will perceive the need for drastic revisions in international society. Mr. Freeman's argument here is very strange, indeed, for it is the Soviet Union that insists most upon the non-impairment of the traditional prerogatives of national sovereignty; this insistence is maintained even in their version of a totally disarmed world.

Conclusion

This brief comment tries to carry on the dialogue initiated by Mr. Freeman. It recognizes the importance of the issues that he raised but disagrees about their disposition. In so doing, it has tried to answer the criticisms made of McDougal and Feliciano, and to hazard some independent judgments.

RICHARD A. FALK