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McDougal and Feliciano: Law and Minimum World Public Order: Or-The Legal Regulations of International Coercion

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REVIEWS


Had anyone predicted fifteen years ago that two leading international law scholars would produce a treatise of nearly nine hundred pages on the law of war, they would have been considered heretical or cynical. From the séances of the International Law Commission to the debates of learned societies, the demise of the law of war was being proclaimed by the prophets of the new UN epoch.\(^1\) Except for the literature on war crimes, which was very largely retrospective in character, the law of war was not a subject that attracted those authorities capable of writing major treatises. It is true that after the outbreak of the Korean conflict there was a definite revival of interest in the law of war, but in the last ten years, there has not appeared a really comprehensive treatise on the whole law of war.\(^2\) The work of Professors McDougal and Feliciano is, therefore, a most welcome, long overdue contribution to the literature of contemporary international law. In its scope, in its scholarship, in its realism, and, above all, in its methodology and its jurisprudential foundation, it goes far beyond the levels of the standard works on the subject.

McDougal and Feliciano start from the sound premise (which has nevertheless eluded many of the major authorities) that the first task in international law is to build minimum world order now. International conflict is a fact of life that must be dealt with from day to day; one dare not permit it to go unchecked while the final touches are being given to panaceas of international peace, unity, and cooperation. Indeed, the authors know from their extensive collaboration with social scientists (as well as from their own insights as lawyers) that conflict is a perennial element of any society, even the most advanced.\(^3\) Hence the true goal of international law and organization is not, as is so often asserted, a

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world without conflict and coercive force, but a world in which coercive force is progressively channeled to serve the goals of the international community.

On this realistic basis McDougal and Feliciano treat the whole spectrum of international conflict in terms of the basic goal of community regulation of coercive measures to the end that minimum world order be maintained. The treatment is notable for a number of reasons. First, unlike the great majority of authorities on the law of war, they face squarely the challenge of modern weapons. They deal with the *jus in bello* pertaining to combat situations, recognize the deficiencies of existing doctrine and approaches, and point the way to the further work which confronts international lawyers in this too-often avoided area of the law of war.

A second important characteristic of the work is that it makes extensive use of the technical literature on war. One is often disheartened by a work on the law of war which gives scarcely a footnote to the voluminous literature on war or on the underlying processes of international relations. McDougal and Feliciano make excellent use of the factual material in war crimes proceedings, as well as of the standard service manuals on the law of war. Of course, other authors have used these sources, although not always so well. However, the most significant aspect of McDougal and Feliciano's source techniques rests in their insistence on unearthing the facts of modern warfare. This is revealed in their use of technical manuals on the conduct of operations, military histories and texts on military science, militarily significant scientific and technological studies, and key writings on the relationship between arms control and military doctrine.  

It seems incredible that most writers on the law of war have been so slow to recognize that one must study a great deal about war before turning to the formulation of rules intended to govern that complex phenomenon.

Moreover, since international conflict occurs in the context of the totality of international relations and not in a vacuum, it is heartening to find international lawyers who are conversant with the ever-expanding multi-faceted literature of international relations. Surely this kind of broad, interdisciplinary approach is essential to any meaningful study of the international law of war and it is precisely this approach which gives the book a third distinctive characteristic.

McDougal and Feliciano conceive of the law of war as a dynamic process wherein there is a dialectical interaction between competing values. As against the simplistic notion that "the law" is relatively clear and that an action is either clearly "legal" or "illegal," the authors depict the operation of the law as one in which competing values, embodied in the "claims" of the belligerents, are constantly being weighed and balanced. From this process there emerges from time to time a rule of customary or convention-made law. But implicit in the very process whereby this rule was produced is the understanding that the particular compromise of one historical period may very likely prove unaccept-

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4. Note particularly the footnotes on existing chemical and biological warfare means, pp. 632-40, air and space weapons, pp. 640, 658, and nuclear weapons, pp. 659-68.
5. See in particular, pp. 36-49, 57-59, 127, 521-30.
able or inadequate to another period. This approach, of course, tends to ensure avoidance of a very common error, the error of attempting to determine the "legality" of a means of warfare on the basis of a rule that was developed for an entirely different period, e.g., the submission that the "legal status" of nuclear warfare was predetermined in the 19th century, before the fantastic development of modern military technology and the division of the world into profoundly antagonistic ideological blocks.

The dialectical character of their approach likewise tends to prevent McDougal and Feliciano from succumbing to the contemporary over-emphasis on convention-made as distinguished from customary law in the international law of war. They state:

The more obvious method by which the law of war is prescribed is by explicit agreement of the participants, as in great international conventions like those of the Hague and Geneva. It is commonly recognized, however, that the method of explicit agreement, particularly in the field of management of combat, has never been able to achieve much more in formulation than a general restatement of pre-existing consensus about relatively minor problems. Negotiators, seated about a conference table contemplating future wars and aware of the fluid nature of military technology and technique, imagine too many horrible contingencies, fantastic or realistic, about the security of their respective countries to permit much commitment.

Much more effective than explicit agreement in the prescription of the law of war has been the less easily observed, slow, customary shaping and development of general consensus or community expectation.

It will be noted that McDougal and Feliciano consider that the shortcomings of conventions on the means of combat are "commonly recognized." Yet how often do we hear the more simplistic prophets of world law and their lay supporters (particularly natural scientists) urging that all nuclear problems be solved by a simple convention of the kind that the authors so rightly deprecate?

To the three characteristics of the work outlined above—adequate attention to the *jus in bello* as it pertains to modern means of combat, extensive use of sources concerned with the material facts and dynamics of war and international conflict in general, and a dialectical analysis of the processes of formulating limitations on the use of international coercion—we may add a fourth. This fourth characteristic is perhaps the most important, vital as the other three undeniably are. Unlike the great majority of writers in this field, McDougal and Feliciano have a coherent philosophy of international law in general and, as part of that philosophy, a basic approach to treating that portion of international law which deals with international conflict. What is more, having developed a coherent philosophy, they apply it.

The older writers usually began their treatment of the law of war with a statement of basic principles. Perhaps the most influential was the statement of

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8. P. 50.
principles in Francis Lieber’s code for the guidance of the Union armies in the Civil War. Although these principles have been reiterated in the United States (and some other) manuals on the laws of war, the general tendency of modern writers has been to concentrate on the comparatively large corpus of convention-made law and war crimes materials and to neglect the study of the basic principles of the law of war. This tendency is particularly regrettable because of the radical changes in contemporary military science. The principles of the law of war as they were expressed by Lieber coincided with the limited character of war of the time and the latter in turn was traceable to the contemporary state of international politics and of military technology.

The successive impact of modern “total” war, models 1914, 1939, 1945 and 1962, has brought about a well-known series of reappraisals of the fundamental precepts of military science. But little has been done towards re-examining the basic principles of the law of war to determine what is fundamental and to be defended at all cost and what is ephemeral, irrelevant, or positively misleading, and therefore to be eliminated. McDougal and Feliciano have been among the very few legal scholars to see this and to do something about it.

McDougal and Feliciano set out to find the basic politico-military principles which have been thought to be essential to military science and to compare these principles with traditional legal principles. At the heart of the politico-military approach to international coercion, they find the principle of economy of force, well stated by Professor Osgood and worthy of reproduction here:

[The principle of economy of force] prescribes that in the use of armed force as an instrument of national policy no greater force should be employed than is necessary to achieve the objectives toward which it is directed; or, stated in another way, the dimensions of military force should be proportionate to the value of the objectives at stake.

The authors immediately point out the “coincidence of ‘economy of force’ as an underlying principle of the rational application of coercion with ‘military necessity’ as a basic principle of the law of war...” Note that the unifying element is rationality. Unlimited violence has by definition neither rational purpose nor normative justification.

Thus McDougal and Feliciano assert the basic principle of military necessity in sharp contrast with the followers of the late Judge Lauterpacht. Lauterpacht contended that the “true character of the law of war” is “almost entirely humanitarian in the literal sense of the word” and that the mitigation of suffering “and not the regulation and direction of hostilities, is its essential pur-


12. P. 36 (emphasis added).
pose.” 13 This view of the nature of the law of war accounts for Lauterpacht's argument that "it is probable that the rules of warfare as applied in the First and Second World Wars cannot be related to any overriding legal principle or principles other than those which are of a humanitarian origin or complexon." 14 Lauterpacht says in effect that there are no meaningful international law principles with respect to the principal means of modern warfare; all that the law can do is to mitigate the consequences of combat. Since McDougal and Feliciano posit the basic principle of military necessity, they reject this narrow limitation of the scope of the jus in bello to the periphery of combat and feel competent to attack the critical problems involved in the normative analysis of the actual means of combat. They assert that the principle of military necessity provides normative guidance for the legal conduct of operations, that the jus in bello penetrates all the way to the heart of military policy making.

In a central passage the stage is set for the introduction of the principle of military necessity. It is asserted that:

In the regulation of hostilities, the patterns of specific controversy to which authority must respond are established by the reciprocal claims of the participants to apply violence against each other's bases of power, by employing certain combatants and weapons, in certain areas of operation, against certain objects of attack. 15

The key concept of the law of war, essential to orderly normative analysis of the problems of international conflict, is then introduced:

For resolving such controversies, authoritative decision-makers bring to bear the familiar complementary policies of military necessity and humanitarianism. In all the many varying contexts, these polar policies struggle for recognition and ascendancy or compromise: permissible destruction is characterized in such technical terms as "combatant," "underprivileged belligerency," "military objective," "permissible weapon," "war booty," and "legitimate reprisals"; nonpermissible destruction is described in such terms as "noncombatants," "civilian immunity," "open city," "nonmilitary objective" and "unlawful confiscation." 16

McDougal and Feliciano then take the position that in the legal disposition of these rival claims "... the key concept ... is of course that of military necessity, which affects both the formulation of general prescriptions and their concrete application in particular instances." 17 Again relating legal to politico-military doctrine, they state:

In a form of statement which adds a few words to the general principle of economy in the exercise of force, this concept may be said to authorize such destruction, and only such destruction, as is necessary, relevant, and pro-

13. Lauterpacht, The Problem of the Revision of the Law of War, 29 BRITISH YEARBOOK OF INT'L L. 361, 364 (1952). It should be noted that this contrast with the Lauterpacht view is not explicitly mentioned by McDougal and Feliciano themselves but the difference in basic approach is so evident as to justify this analysis by a third party.
14. Ibid.
15. P. 71.
17. P. 72.
portionate to the prompt realization of legitimate belligerent objectives. Since it is not feasible, as a practical matter, to quantify and to measure precisely the amount of destruction necessary, the fundamental policy embraced in this concept must be modestly expressed as the minimizing of unnecessary destruction of values.\textsuperscript{18}

This reviewer believes that this formulation comes very close to the heart of the law of war. As against the belief that the law of war consists almost exclusively in a few iron-clad prohibitions against certain means of war coupled with humanitarian \textit{temperamenta belli}, it can be asserted that the foundation of the \textit{jus in bello} rests in the notion that although war is normatively permissible, it is also a normatively limited human activity in which certain kinds of coercion are authorized on the condition that they conform with the positive principle of legitimate military necessity. McDougal and Feliciano would express this in terms of “compromises” between the principle of military necessity and the “complementary” principle of humanity. In other words, there are two “polar” principles. First, there is the principle of military necessity which simultaneously authorizes truly necessary, proportionate means and prohibits militarily unnecessary, disproportionate means.\textsuperscript{19} Secondly, there is the principle of humanity which demands, in the name of “a public order of human dignity,” “that the least possible coercion be applied to human beings, and that all authorized control over human beings be oriented towards strategies of persuasion with widest possible participation in decision, rather than towards strategies of coercion.”\textsuperscript{20} McDougal and Feliciano then assert that, “The point which does bear emphasis is that the whole process of authoritative decision with respect to combat situations is a continuous effort to adjust and accommodate the specific requirements of both these interests in a series of concrete contexts.”\textsuperscript{21}

This formulation of the “equilibration between military necessity and humanity”\textsuperscript{22} is open to some question. There would appear to be good reason to assert that there are not two “complementary” principles, military necessity and

\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid.
\textsuperscript{20} P. 523.
\textsuperscript{21} Ibid.
\textsuperscript{22} Dunbar, \textit{The Significance of Military Necessity in the Law of War}, 67 \textit{JUR. REV.} 201, 211-12 (1955), cited by McDougal & Feliciano, \textit{op. cit. supra} note 2, at 523 n.2a. It is important to acknowledge that the authors themselves have seen the possibility of combining the two complementary principles of military necessity and humanity into one principle. They say that:

The principles of military necessity and of humanity may be synthetized and generalized on a still higher level of abstraction in terms of a single and overriding conception of minimum unnecessary destruction. Historically, however, it may be observed that authoritative decision-makers seek to consider and compromise the competing requirements of each principle in varying specific contexts.

P. 530.

The reviewer prefers to combine the two concepts into one principle, legitimate military necessity. See O’Brien, \textit{supra} note 9, and \textit{Legitimate Military Necessity in Nuclear War}, 2 \textit{World Polity} 36 (1960).
humanity, but one principle wherein the consideration of military utility (economy of force) are already balanced with the fundamental limits placed on any human behavior, whether in time of conflict or of peace, by “higher law,” “a public order of human dignity,” “natural law,” or whatever normative order one might posit as superior to positive international law. It may be readily admitted that the practical consequences of distinguishing a single comprehensive principle of military necessity from complementary principles of military necessity and humanity may not be great. The two formulations are so close that it might be better to leave that of McDougal-Feliciano unchallenged. But the searching analysis of McDougal and Feliciano challenges further speculation. They seem to be saying that in each determination as to the legitimacy of an act of international coercion one must balance true, objective military utility with the requirement that the basic values of human dignity be disturbed as little as possible. But is this two-element proposition not in truth a one-element proposition? Generally speaking, if a military commander manages to limit his means to the minimal requirements of objective military utility will he not have gone a long way towards ensuring that the basic values of human dignity are disturbed as little as possible?

This still leaves the question whether there may not be means which may never be used, even if they are justified in terms of strict military utility. Torturing prisoners of war to obtain vital information might be a good example. Here most higher law traditions would assert that there are things which men may not do to other men, no matter what the “necessity.” Now although it would appear that McDougal and Feliciano have such a limit on military necessity in mind, they do not really make their point explicitly when they speak of making compromises between military necessity and the demands of the principle of humanity. For if an action or means is clearly contrary to the basic rights of human dignity there is no balancing, it simply may not be done, regardless of its potential military utility. In other words, it is malum in se. On the other hand, if an act or means of war is not malum in se, it is permissible if it meets the requirements of legitimate military necessity, viz. if it is truly necessary, proportionate to a legitimate military end, and not prohibited by the laws of war.

What the reviewer is suggesting is this: a definition of legitimate military necessity which includes the McDougal and Feliciano concept of military necessity in the sense of the normative counterpart of the military science principle of economy of force (or utility) and which adds the proposition that acts or means which are morally malum in se are always and without exception legally

23. See relevant comments exchanged in O’Brien, supra note 9, at 152-54, and McDougal & Feliciano, op. cit. supra note 2, at 529.

24. The point which does bear emphasis is that the whole process of authoritative decision with respect to combat situations is a continuous effort to adjust and accommodate the specific requirements of both these interests [humanity and economy of means] in a series of concrete contexts.
prohibited would appear to have assimilated the principle of humanity into a single comprehensive principle, the principle of legitimate military necessity. However, as indicated at the outset of this discussion, the two formulations are very similar. As against other, quite different definitions of the basic principles of the law of war, they may fairly be considered as forming a single point of view.

Nevertheless, there is another central point on which the reviewer must remain in disagreement with McDougal and Feliciano. They state quite rightly that the operative concept in the application of the principle of military necessity is proportionality of means to ends. The question then occurs as to whether proportionality should be calculated in terms of ultimate, political ends (raison d’état) or proximate, military ends (raison de guerre). McDougal and Feliciano state that, “It is not easy to see how military objectives could be evaluated as legitimate or nonlegitimate save in terms of their relation to some broader political purpose postulated as legitimate.” This may possibly be true at the level of ultimate evaluation by authoritative decision-makers of a record of coercive action. However, at the level of tactical commanders it is generally impossible to judge or to control significantly the whole political-military picture. The commander is faced with a series of military problems which he should attempt to solve by the use of appropriate means which are proportionate to accepted military ends. The legitimacy of his policy choices should be judged solely on that basis unless, as is sometimes the case, his powers and responsibilities extend into the area of higher political policy. This approach, admittedly, still does not address itself to the problem of normative evaluation of the legitimacy of the ultimate political, strategic ends which, true enough, engender the military ends. It seems clear that this complex subject warrants additional thought and the perspectives furnished by McDougal and Feliciano will be invaluable to those who take up this task.

This review has concentrated on some conceptual and methodological questions which are raised in impressive form by McDougal and Feliciano. Many other important facets of the work, for example, the imaginative treatment of the problem of distinguishing “war” in the traditional sense from the many other forms of coercion, have not been treated here. For, of the many contributions which this work makes, none is more significant than its comprehensive re-examination of the fundamental character of the law of war. It is to be hoped that this fresh analysis will encourage other scholars to turn their attention to a part of international law which is even more important today than it was when Grotius placed “Belli” before “Pacis” in the title of his classic work.

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