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McDougal & Feliciano: Law and Minimum World Public Order

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LAW AND MINIMUM WORLD PUBLIC ORDER. By *Myres S. McDougal* and *Florentino P. Feliciano*. New Haven: Yale University Press. 1961. Pp. 872. \$12.50.

The authors' descriptive title of this exhaustive treatise is "The Legal Regulation of International Coercion." There is great merit in the scholarly treatment given this subject for scholars have always been the leaders in the definition and advancement of international law. However, the authors have not been content merely to set forth philosophical principles but have marshalled their orderly conclusions for the practical benefit of the decision-makers in the world arena.

At the outset legal scholars are taken to task for speaking from one or the other of two attitudes, each detrimental to the goal of a "world public order honoring human dignity." The first group accepts and "affirms that man's destructive impulses and instruments of violence have escaped" beyond the control of law. (p. 2) In the alternative there is an over-emphasis on formal concepts and rules, such as the not uncommon reliance of the second group of writers upon the two conditions of "war" and "peace" to the exclusion of all others.

In the analysis of practices and decisions the authors distinguish between the "factual process of international coercion and the process of authoritative decision" in the regulation of international coercion. Such a distinction will lead scholars and decision-makers toward "alternatives in the formulation and application of policy better designed to promote a world public order embodying the values commonly characterized as those of human dignity in a society of freedom and abundance." (pp. 10-11)

It is interesting to note that the authors find a new sanction for the violation of the law of war in the common interest of all participants in minimizing unnecessary destruction of values or, as often stated, economy in the use of force. Even the so-called "nuclear stalemate" which has

brought forward discussion of "limited war" stems from the same principle of economy in the use of force.

Having set the stage for the decision-makers the authors analyze, in magnificent detail, the various stages of the process of coercion in the world arena, from initiation to termination. The writers who insist upon an exact answer to the question "When does war begin?" are criticized for failing to recognize the importance of many variables such as participants, objectives, methods, conditions and continuity and "that the initiation of coercion generates, not one unitary problem of ascertaining a precise moment of time for the beginning of a singularly elusive and all-sufficing 'legal state of war,' but rather a whole series of complex problems." (p. 100)

In the chapter entitled "Resort to Coercion" aggression and self-defense are the principal topics and are intimately related to the theme of this volume. Thus, it is stated that there is "increasing awareness that efficient world institutions for the optimum creation and distribution of values depend upon the securing of minimum order," and that this requires "effective community controls" of "the processes of coercion and violence among nation-states." (p. 122) Complementary and fundamental prescriptions of permissible and nonpermissible coercion are necessary both in theory and practice.

The conception of *bellum iustum* which had been superseded by a recognition of the finality of decision has reappeared in the attempts under the League of Nations and the United Nations to distinguish legal and illegal coercion. Rejecting the usefulness of stark definitions in this area of permissible and nonpermissible coercion the authors outline the steps necessary to establish community policies applicable thereto. The different types of decision-makers must be identified; an analysis of the initiating coercion particularly with respect to priority is necessary, and consideration must be given to the character of the participants, the nature of the participants' objectives, the kind of coercion and the relationship to community procedures.

The discussion of the requirements of permissible self-defense is especially interesting and apropos. It abounds with reflections on past examples of coercion allegedly based on self-defense coupled with treatment of theoretical situations. Here as elsewhere the authors ultimately specify the detailed considerations designed to lead the decision-makers, be they executives, military leaders, or judges, toward appropriate conclusions.

To secure world public order the authors point the way to minimum order which they describe as "freedom from expectations of severe deprivations by unauthorized coercion and violence." (p. 261) To implement or sanction the principle of minimum order there is required not only the invention and establishment of varied sanctioning practices but also the "creation and fostering of the necessary predispositions in effective decision-

makers to put such structures and procedures in operation." (p. 263) It is recognized that in theory the sanction of force has its detractors and in practice its failures, yet it remains an effective agent in maintaining world order. But it is not the only sanction in this field of international law. An important one is, of course, world opinion. Another and unusual one advanced by the authors is the recognition by States that international law is binding upon them.

The section on strategies is well adapted to practical use, being less afflicted with tautology, an apparent defect of much of this volume.

Extensive treatment is given to the relationship of neutrality to the process of legal regulation of international coercion. This relationship derives its validity from the aspect of participation or nonparticipation in coercion. Proceeding upon the assumption that a State may, under present conditions, be neutral as respects belligerents, the authors nevertheless recognize the present obligation of States under the United Nations Charter's characterization of unlawful coercion. Of this extensive chapter on neutrality it may be said that the complementary claims of participants and nonparticipants are admirably treated in the context of existing and former community rules, and also with reference to rules derived from customary international law. Especially enlightening is the discussion of the extent of a belligerent's right to embargo economic intercourse with the enemy.

In the chapter on "Community Regulation of Combat Situations" the authors move bravely into the fray of current discussion concerning the principles of war, *i.e.*, the principles of necessity, humanity, and chivalry. The last is quickly buried in the graveyard of feudalism. The interest of the authors in human dignity in its broadest concept fosters implicit recognition of the current applicability in combat of the principle of humanity. This recognition is made easier by equating the principle of humanity with that of economy of force or minimum destruction of values. As in other modern treatment there is a strict limitation placed upon the use of the principle of military necessity.

Continuing the discussion of combat situations the authors consider claims with respect to permissible combatants. Significant observations are made with respect to the trend of recent opinion concerning partisans or guerrillas, a matter of present consideration in legal theory among the publicists, and a matter of importance in current practice as well. Claims with respect to permissible "Objects of Attack" are assessed in the light of the principles of military necessity and minimum destruction of values. People, resources and institutions are the categories considered, principally in the light of decisions of War Crimes Tribunals and national courts and speculation on the effects of nuclear warfare. This chapter is especially useful since it is filled with logical conclusions, designed to assist both the codifier and the decision-maker.

Among the "Claims With Respect to Permissible Instruments and Means of Attack" are those relating to submarines and nuclear weapons. As to the former it is said that "The submarine as a weapon of war has raised important, continuing legal issues." (p. 626) Concerning the latter the authors conclude "that processes of derivation and 'analogy' from conventional rules and from inherited principles are hopelessly inadequate to sustain assertions, in realistic expectation of probable future decision, of a comprehensive prohibition in international law of the use of nuclear weapons. . . . A more promising alternative for limitation of nuclear violence may conceivably reside in the curious paradox that the capability and reciprocal promise of mutual annihilation is today widely regarded as a basic condition for keeping peace between the polar powers." (pp. 667-68)

Especially for the guidance of judges as decision-makers there is adequate treatment of jurisdiction and procedure in war crimes trials. In the chapter on "Belligerent Occupation" the authors display a commendable interest in a basic problem, the authority of the occupant to alter fundamental institutions. Lacking judicial construction of this limitation, detailed attention is given to the Allied occupation of Germany where, for example, the denazification was challenged as being inconsistent with the Hague Regulations. As to coercive measures by the occupant the authors indicate that the simple approach by the decision-maker is to accommodate the security interests of the occupant with the human rights of the inhabitants. In passing, this reviewer suggests that the phrase "security interests of the occupant" is too narrow a concept to encompass all of the occupant's recognized rights.

Overall contemplation of this complex yet learned treatise impels the suggestion that the voluminous treatment may detract from its practicality unless an authoritative condensation, phrased in the customary terms of the varied contexts, is provided for the decision-makers who usually lack the time to absorb and appreciate fully the complex bases for action set forth in this volume. However, this is not intended to detract from the commendations due the authors for their success in pointing the way toward the attainment of peace and the enhancement of human dignity.

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