

In Memoriam

Florentino P. Feliciano[†]

It was an act of courage on the part of Myres S. McDougal to undertake, in the 1950s, a book about the law of war. It was the height of the Cold War. Large numbers of nuclear weapons were poised to destroy the United States, the Soviet Union, and much of the rest of humanity. The clock of the Bulletin of Atomic Scientists read two minutes to midnight. Public perception of the danger was acute. School children in the United States were undergoing not the ordinary fire drills, but nuclear attack drills. People were building bomb shelters in their backyards, underneath the barbecue grills.

When we began our study, scholarship on the law of war was almost evenly divided between two camps. One camp, the Realists, assumed that a law of war had become impossible. A very distinguished Belgian jurist, Charles de Visscher, in his influential *Theory and Reality in Public International Law*, counseled his academic colleagues:

The new weapons of mass destruction have revolutionized all the data of war, and it is above all for this reason that the jurists will be well advised to waste no further time in what some of them still persist in calling the “restatement” of the laws of war. To try to adapt these laws to the new conditions is not only labor absolutely lost; it is an enterprise that in certain of its aspects may be dangerous There is better work to be done today than picking up the fragments of an obsolete body of rules.¹

The other camp was composed of equally distinguished and deeply committed, but perhaps somewhat romantic, scholars. These scholars assembled formulations of rules enumerated over the last one and a half centuries and attempted to weave them into a coherent set of propositions that somehow, they hoped, would restrain top political and military leaders and battlefield commanders. Precisely because the issues involved were so

[†] LL.M. 1953, J.S.D. 1955, Member, Appellate Body, World Trade Organization, Geneva, Switzerland.

1. CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 293 (1957).

important to the future of mankind, Myres McDougal identified this subject for the first of a series of treatises on international law that he was projecting. I had the honor, which I have treasured throughout my life, of being invited to collaborate with him on the project. My preparation was limited. I had read the Hague Conventions of 1899 and 1907 and the Geneva 1929 Prisoners of War Convention during my undergraduate days in the law school of the University of the Philippines. However, my experience during the belligerent occupation of the Philippines by Japan during the Second World War had not inspired a deep faith in the efficacy of this law.

We started our work with no illusions. We assumed nothing—certainly not the basic premise of other scholars that war and peace had to be distinguished sharply since each state or condition of things had attached to it a separate corpus of rules—the law of peace and the law of war—that operated successively, at different times, one to the exclusion of the other. We understood that whether the terms “war” and “peace”; “low intensity conflict” and “peace”; or “no war and no peace,” were used or not by legislators, administrators, or judges, nation-states exercised against each other a continuously varying degree of coercion. That coercion may range from a very low, perhaps negligible level, in which case we spoke of influence in basically consensual types of political and economic situations, all the way to the opposite pole of very intense applications of military violence resulting in more or less widespread destruction of human life and property and environment. A treatise that sought to grapple with these factual processes across state boundaries would have to be organized quite differently from the standard texts.

At the outset, therefore, we described in comprehensive terms those phases of interaction across state boundaries that are marked by a relatively high degree of coercion exercised with a relatively extensive destruction of human life and other human values. We also described the processes of decisionmaking in which authoritative or legal norms were thought to play some role, by which processes the international community sought to control, regulate, or mitigate the processes of force and violence. We identified the major types of controversies that posed common or related issues of policy and that are addressed by various officials—executive, military, or judicial—located in various levels and phases of the continuous processes by which authoritative decisions are made and implemented. The central aspect of our enterprise was the effort to articulate and clarify the essential principles of minimum or basic order—that is to say, the principles indispensable for achieving that minimum of public order without which the bonds of society break apart and there is only the darkness of chaos and the war of each against all others.

When recourse to force does occur, the community policies needed to reduce to a minimum the destruction of life and other human values also need to be clarified and examined in detail. We reviewed the scholarly literature in detail and discovered that much of the learning and rhetoric in use did not contribute significantly to intellectual clarification or to identification of the necessary policies.

We appreciated that one of the most difficult problems in the field was that of distinguishing between lawful and unlawful resort to intense coercion, i.e., military force or violence. This had been a recurring problem in the application of the law of war for centuries, and it had become a front-line problem when the United Nations Charter was promulgated at the end of the Second World War. We rejected "bright line" formulations or catchy phrases that seemed to permit a decisionmaker, with apparent ease, to decide quickly whether particular exercises of coercion, especially intense coercion, were lawful or unlawful. Instead, considering the complexities in the transborder applications of coercion, and especially the difficulties of objective fact finding in international relations, we suggested a framework and modes of explicit, systematic, and contextual examination of applications of force and violence, and we appraised those in terms of short- and long-term goals of the community of nations before concluding that particular uses of coercion were lawful or not.

One of the most important functions of an organized community is the initiation and management of sanctions in order to secure the implementation of law in respect of resort to force, as well as law about particular exercises of force. We examined the arsenal of instruments available to the international community and, more important in my view, we analyzed the various strategic objectives of sanctions operations.

We examined as well the issues of neutrality in the world where the United Nations Charter had been promulgated, but whose levels of commitment had already begun to be eroded.

We also explored the law of war in actual combat situations. Here we sought to develop sets of criteria that could assist a decisionmaker (whether a battlefield commander or a judge of a court-martial or of a war-crimes tribunal) in addressing such questions as who the permissible combatants were and which weapons were permissible in what types of situations to achieve what levels of destruction. I believe we were among the earliest to observe that the law of war in combat situations is in fact the law of human rights in armed conflict situations.

Finally, we explored in detail the complex subject of belligerent occupation, a subject whose recurrent importance we had not contemplated at that time. In recent times, though, it is as contemporary as the wars in the Persian Gulf, Bosnia-Herzegovina, Kosovo, and the Congo.

The reception of *Law and Minimum World Public Order: The Legal Regulation of International Coercion* was itself an interesting story. The book promptly became a *vade mecum* in ministries of defense in many countries. Its utility for national war colleges and legal advisers to defense and foreign affairs ministries derived as much from the comprehensiveness and thoroughness of the detailed examination of the legal instruments and doctrinal literature as well as case law on the subject, as from the method of thinking about problems that it offered. In the United States Department of Defense, I have it on good authority that Mac became something of a hero. Mac himself, however, admitted only that after our book came out, he became a private consultant to the Joint Chiefs of Staff and served as such for a substantial period of time. In the then-Soviet bloc countries, the book was analyzed in detail and frequently criticized, but I was told that certain approaches taken in subsequent Soviet bloc literature indicated that even that literature was not completely immune from our book's influence. I leave it to you to decide whether that was a commendable thing or not. What I can testify from personal experience was that some of our basic concepts—those relating to management of combat operations and to belligerent occupation—find reflection in the Two Additional Protocols of 1977 to the Geneva Conventions of 1949. Indeed some of the language of Protocol One sounds remarkably similar to language found in certain chapters of our book. After the 1977 Protocols were adopted by the intergovernmental conference, I suggested to Mac that at long last, our book and its authors had become respectable.

Looking back over almost forty years since the book was first published, I think it is clear that the approach we developed with respect to determining the lawfulness of weapon selection and application in combat situations has become the standard mode of analysis. Our theory of sanctions, which I believe is a distinctive contribution to the jurisprudential literature, is now reflected in the many appraisals of war-crimes tribunals, truth and reconciliation commissions, compensation commissions, and other institutional means for dealing with grave violations of the law of war and for stitching together the social fabric that armed conflict tears asunder. Our analysis of aggression and neutrality, however, seems to have been largely overtaken by time and global political developments. Despite the general language of the collective security system in the United Nations Charter and its virtual universality, states seem unwilling to accept the obligations that it necessarily entails. Professor McDougal would very probably have thought that there will yet be a sad price to pay for this backing away from law, and I fear that he would be correct.

This brief account of the impact that Myres McDougal had on the law of war would be incomplete if I did not mention the impact he had on a young student from the Philippines who had come to Yale for graduate

education. That young student could hardly have anticipated that he would be befriended by this towering figure in international law, made into a collaborator, and that the professor would stand by as a warm and committed personal friend and father figure, and a caring friend of my own children, for a lifetime. Most if not all of the important things that have happened to me in the course of my own career in the law have been in some way or another connected to collaboration with, and the teaching and friendship of, Myres McDougal.

