THE LIBRARY OF ESSAYS IN
INTERNATIONAL HUMANITARIAN LAW

The Implementation and Enforcement of International Humanitarian Law

Michael N. Schmitt and
Wolff Heintschel von Heinegg

The Implementation and Enforcement of International Humanitarian Law

Edited by

Michael N. Schmitt

US Naval War College, USA

Wolff Heintschel von Heinegg

Europa-Universitat Viadrina, Germany

ASHGATE

Published by
Ashgate Publishing Limited
Wey Court East
Union Road
Farnham
Surrey GU9 7PT
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington
VT 05401-4405
USA

www.ashgate.com

British Library Cataloguing in Publication Data
The implementation and enforcement of international humanitarian law. – (The library of essays in international humanitarian law)
1. Humanitarian law. 2. War (International law) 3. War crimes. 4. War crime trials.
I. Series II. Schmitt, Michael N. III. Heintschel von Heinegg, Wolff.
341.6'7–dc23

Library of Congress Control Number: 2011946113

ISBN 9780754629382

MIX
Paper from responsible sources
FSC® C018575
FSC
www.fsc.org

Printed and bound in Great Britain by the MPG Books Group, UK

Acknowledgements

The editors and publishers wish to thank the following for permission to use copyright material.

Cambridge University Press for the essays: F. Kalshoven (1990), 'Belligerent Reprisals Revisited', *Netherlands Yearbook of International Law*, **21**, pp. 43–80. Copyright © 1990 TMR Asser Press, The Hague and the contributor; Jelena Pejic (2002), 'Accountability for International Crimes: From Conjecture to Reality', *International Review of the Red Cross*, **84**, pp. 13–32. Copyright © 2002 International Committee of the Red Cross; Frits Kalshoven (1991), 'State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV to Article 91 of Additional Protocol I of 1977 and Beyond', *International and Comparative Law Quarterly*, **40**, pp. 827–58. Copyright © 1991 British Institute of International and Comparative Law.

Charles J. Dunlap Jr (2001), 'Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts', *Carr Center for Human Rights Policy*, http://duke.edu/~pfeaver/dunlap.pdf. Copyright © 2001 Charles J. Dunlap.

Copyright Clearance Center for the essays: G.I.A.D. Draper (1979), 'The Implementation of the Geneva Conventions of 1949 and the Additional Protocols of 1978', *Recueil des Cours*, **164**, pp. 9–54. Copyright © 1978 Brill Academic Publishers; Edwin M. Borchard (1915), 'Private Pecuniary Claims Arising Out of War, *American Journal of International Law*, **9**, pp. 113–46. Copyright © 1915 American Society of International Law; Leslie C. Green (1977), 'The Role of Legal Advisers in the Armed Forces', *Israel Yearbook on Human Rights*, **7**, pp. 154–65. Copyright © 1977 Brill Academic Publishers; A.R. Albrecht (1953), 'War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949', *American Journal of International Law*, **47**, pp. 590–614. Copyright © 1953 American Society of International Law.

L.C. Green (1981), 'The Man in the Field and the Maxim of Ignorantia Iuris non Excusat', *Archiv des Volkerrechts*, **19**, pp. 169–87. Copyright © 1981 L.C. Green.

Naval War College for the essay: Yoram Dinstein (1998), 'The Universality Principle and War Crimes', in M.N. Schmitt and L.C. Green (eds), *The Law of Armed Conflict: Into the Next Millennium*, Newport, RI: US Naval War College, pp. 17–37.

Oxford University Press for the essay: Yves Sandoz (2009), 'The History of the Grave Breaches Regime', *Journal of International Criminal Justice*, **7**, pp. 657–82. Copyright © 2009 Oxford University Press.

Public domain: William H. Parks (1973), 'Command Responsibility for War Crimes', *Military Law Review*, **62**, pp.1–104.

Royal Institute of International Affairs for the essays: H. Lauterpacht (1944), 'The Law of Nations and the Punishment of War Crimes', *British Year Book of International Law*, **21**, pp. 58–95; Richard R. Baxter (1951), 'The Municipal and International Law Basis of Jurisdiction over War Crimes', *British Year Book of International Law*, **28**, pp. 382–93.

UBS Press for the essay: L.C. Green (1970), 'Superior Orders and the Reasonable Man', *Canadian Yearbook of International Law*, **8**, pp. 61–103.

Every effort has been made to trace all the copyright holders, but if any have been inadvertently overlooked the publishers will be pleased to make the necessary arrangement at the first opportunity.

Series Preface

Over half a century ago, Sir Hersch Lauterpacht, then Whewell Professor of International Law at the University of Cambridge, observed that 'if international law is the vanishing point of law, the law of war is at the vanishing point of international law'. He was wrong. While it is true that the law of war, or international humanitarian law as it has become known, is particularly vulnerable to the vagaries of political, social and economic influences, it has nevertheless proven itself a robust normative regime that positively shapes man's most destructive undertaking – warfare. No other body of law can be credited with saving more lives or alleviating as much suffering.

These six volumes comprise a collection of particularly significant works on humanitarian law. They are intended for use by scholars, practitioners and students who seek to better understand the topics addressed herein, together with their lineage. Just as importantly, they allow users to begin to separate the wheat from the chaff. The proliferation of publications in the field, in part a sad reflection of the fact that armed conflict remains so horribly pervasive, as well as the digitization that facilitates access to journals that would not otherwise be readily available, often results in information overload. A Ministry of Defence legal adviser looking for background material to address a situation involving belligerent occupation will, for instance, uncover scores of articles. The student writing a dissertation on the law of targeting or a scholar penning an article on detention will find him- or herself buried in material. Unfortunately, some of what they unearth will prove misguided, out of context or simply wrong. This collection will not break down these obstacles in their entirety. But it does afford a useful starting-point by offering topically arranged humanitarian law journal essays that have been thoroughly vetted by many of the top experts in the field.

In this regard, a few words on the process used to choose the essays are helpful. It began with the selection of those subjects that we believed comprised the *sine qua non* of international humanitarian law – development, principles, scope, application, conduct of hostilities, detention, occupation, and implementation and enforcement. We then contacted over 60 recognized humanitarian law experts, both academics and seasoned legal advisers. They were provided the topics and asked in a very open-ended fashion to identify pieces they considered 'classics', believed to be 'essential' in a compilation of this nature, have found to be especially influential, used regularly in their work or deserved greater attention on the basis of their quality and insights. The experts were asked to pay particular attention to those essays that may have been 'forgotten' over time, but merited 'rediscovery'. Many of them responded in depth. We also benefited from the work of a five-member team from Emory Law School's International Humanitarian Law Clinic which conducted an exhaustive literature review to locate essays relied on regularly by writers – the 'usual suspects', if you will. Finally, as editors we took the liberty of adding a few pieces to the pool *sua sponte*.

Armed with a daunting inventory of candidates for inclusion, we began the difficult task of whittling it down. Many essays proved to be consensus choices among the experts; often the Emory team had also identified them. These provided the skeleton for the project. We then fleshed out the collection based on two key factors: quality assessments by the experts and topic coverage. The latter criterion proved particularly central to the process, for our objective was to produce a collection that not only contained thoughtful and influential works, but also addressed most key humanitarian law topics.

Beyond esteem factors and topical relevance, some essays were selected on account of their temporal significance, that is, having been written at key junctures in the development of international humanitarian law. As an example, the collection includes pieces written in the immediate aftermath of the First and Second World Wars and the attacks of 11 September 2001. Others were published soon after adoption of the 1949 Geneva Conventions or the 1977 Additional Protocols. We hope they both afford insight into the perspectives at play as humanitarian law was evolving and provide a context for understanding the genesis of contemporary norms.

In the end, we were unable to include many insightful and influential works. Exclusion was frequently a mere matter of being cursed with too many good choices on a particular topic. Although no reader is likely to be entirely satisfied with the essays included, or comfortable with the omission of others, we hope the rigorous selection process has resulted in a collection that is both useful and enlightening.

This project would not have been possible without the help of many supporters. We are, of course, deeply indebted to the many international experts who took time from their busy schedules to offer recommendations and comments over the course of the three-year effort. Although we cannot possibly name them all, particular appreciation is due to Ken Anderson, Yutaka Arai, Louise Arimatsu, Laurie Blank, Gabriella Blum, Bill Boothby, Ove Bring, Claude Bruderlein, Knut Dörmann, Alison Duxbury, William Fenrick, Dieter Fleck, Steven Haines, Agnieszka Jachec-Neale, Dick Jackson, Marie Jacobsson, Claus Kress, William Lietzau, Noam Lubell, Lindsay Moir, John Murphy, Sean Murphy, Mary Ellen O'Connell, Bruce Oswald, Hays Parks, Stephen Pomper, Jean-Francois Queguiner, Noelle Quenivet, Adam Roberts, A.P.V. Rogers, Peter Rowe, Joseph Rutigliano, Robert Sloane, Dale Stephens, Ken Watkin and Sean Watts.

We are equally indebted to the brilliant group of young scholars at Emory Law School, whom we dubbed our 'IHL Detectives' – Flora Manship, Carmel Mushin, Jeannine Privat, Nandini Rao and, in particular, Benjamin Farley. Their ability to identify and locate 'lost treasures' of humanitarian law was awe-inspiring. All have since graduated, and we wish them the very best in their professional careers.

Three people deserve special mention and gratitude. Laurie Blank, Director of the Emory's International Humanitarian Law Clinic, ably and tirelessly supervised her team. Beyond supervision, she also devoted an enormous amount of her own time to the substance and administration of the project. At European University Viadrina, Kaya Kowalski took on the task of collating materials and later working with us as we made the final selections for the collection. She was unflappable in the face of our long and sometimes contentious deliberations and always exceptionally good-natured and professional. Finally, we thank our editor at Ashgate, Valerie Saunders, who showed the patience of Job throughout.

We hope this collection proves valuable in the years to come. For our part, it was a fascinating endeavour.

MICHAEL N. SCHMITT
Newport, Rhode Island, USA

and

WOLFF HEINTSCHEL VON HEINEGG
Frankfurt (Oder), Germany

Introduction

Reciprocity is often characterized as the seminal incentive for belligerents to respect international humanitarian law. Sadly, it appears that this is so primarily with regard to stereotypical international armed conflicts. Many contemporary conflicts, whatever their nature, are replete with deliberate violations of the law – committed sometimes by weaker parties and sometimes by those professing noble aims. Nevertheless, a grasp of the principle of reciprocity and the related concept of belligerent reprisals remains essential to a full understanding of the dynamics of international humanitarian law. For instance, although reprisals are widely prohibited today, they were traditionally viewed as inadmissible only when disproportionate to the prior violation of the law by the other side. Thus, the contemporary prohibition is very much the result of belligerent practices during the two world wars that caused unimaginable suffering.

The subject of implementation and enforcement of international humanitarian encompasses a wide range of issues, including the role of legal advisers and compensation claims by individuals or the enemy state. In view of Article 3 of the 1907 Hague Convention IV and of Article 91 of the 1977 Additional Protocol I, academic examination of the topic used to focus on state responsibility for violations. In contemporary practice, the provisions play only a minor role in supporting the effectiveness of humanitarian law. Today, scholars and international courts tend to turn to human rights law when considering compensation for individuals suffering injuries and damage during armed conflict. Unfortunately, the rules of international humanitarian law that regulate individual claims seem to have been forgotten.

Compliance with international humanitarian law can be fostered through the education and training of the armed forces (and of the general public) and by the implementation of internal disciplinary and penal systems. Indeed, until the end of the Second World War, violations of the law, including war crimes *strictu sensu*, were dealt with via the mechanism of the respective belligerents' domestic law. That approach had two shortcomings. First, certain war crimes escaped regulation. Second, relevant domestic legal provisions often fell short of the gravity of the crimes. In response, the 1949 Geneva Conventions provisions on grave breaches obliged states parties to 'to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention(s)'. Moreover, they introduced the universality principle for grave breaches. Thus, contemporary international humanitarian law benefits from a well-elaborated legal system which guarantees that those who have committed a grave breach (or are responsible for such a breach) will not go unpunished.

The two problems have not been entirely solved because the prosecution of grave breaches was left to the respective domestic legal systems. Indeed, for decades the Nuremberg and Tokyo war crimes tribunals were considered historical anomalies. Yet, their statutes and jurisprudence laid the foundation for what is today commonly recognized as criminal international law. The essays reprinted in this volume highlight the criticality of rules of

public international law in providing for the individual criminal responsibility of those who have seriously violated international humanitarian law. Moreover, they address some of the most serious obstacles to bringing war criminals to justice, especially the plea of superior orders, the contested issue of command responsibility, the immunity of government officials and the lack of political will on the part of governments to comply with their obligations under the Geneva Conventions and the Additional Protocols.

A related issue is the role of international humanitarian law in public perception. Practical experience demonstrates that allegations of violations negatively impact military operations by diminishing public support. In view of this 'CNN effect', armed forces and governments have become increasingly sensitive to reports of (alleged) violations. To an extent, this is a positive development because, with news transmitted in near real time, it is difficult for governments to hide abuses. But there is a negative aspect to this phenomenon. Such transparency can be misused by the enemy to distribute false information about purported international humanitarian law violations in what has been labelled 'lawfare'.

'War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949', by A.R. Albrecht (Chapter 1), offers an interesting analysis of reprisal practice against the background of the post–Second World War war crimes trials and the prohibitions of reprisals in the four 1949 Geneva Conventions. Reprisals are:

> ... otherwise illegitimate acts of warfare which under certain conditions may legally be used by a belligerent against the enemy in order to deter the enemy from a repetition of his prior illegal acts and thus to enforce compliance with the generally recognized rules of war. (p. 1)

The war crimes trials 'transformed the previously sketchy rules on reprisals into a more comprehensive and elaborate system of control' (p. 1). Accordingly, reprisals must satisfy both preliminary and operative conditions. As to the former, reprisals are only lawful in response to an illegal act by the enemy. In this context, Albrecht rejects the notion of a distinction between legal and illegal wars as 'lead[ing] to the breakdown, or at least the serious impairment, of the laws of war' (p. 5). Illegal acts giving rise to a reprisal include those of a state, its organs and even civilians.

A violation of international humanitarian law justifies reprisals only when previous attempts to punish the guilty and resort to other means of redress have proven futile; reprisal is an option of last resort. Moreover, a judicial hearing is essential in the case of reprisals taken against individuals. This preliminary condition requires not an inquiry into the guilt of the person subjected to reprisals, but rather a fair trial before a judicial body in order to assess whether the legal prerequisites for reprisals have been fulfilled. Albrecht concedes that such proceedings may fall prey to abuse, but emphasizes that 'the very need for it may help to increase in some degree the realization of the gravity of exercising reprisals and add to the protection of potential victims' (p. 9).

With regard to the operational conditions that must be fulfilled, Albrecht addresses the unresolved issue of the authority entitled to decide upon reprisals, emphasizes that reprisal measures need not be in kind, examines the prohibition of reprisals against prisoners of war and considers the issue of reprisals against hostages. As to the last subject, his examination of the war crimes trials leads to the conclusion that the prohibition on taking hostages must be

distinguished from the matter of reprisals. Accordingly, 'reprisal law ... must take precedence over hostage law' (p. 14). Additional operational conditions include a geographical relationship between the reprisal's victim and the initial illegal act and proportionality – that is, that the reprisal not be excessive in relation to the prior illegal act. A fixed ratio for the general application of automatic reprisals will typically violate this requirement. Finally, reprisals must be publicized because of their purpose of enforcing compliance with international humanitarian law.

Albrecht concludes that the law of reprisals, as identified by the war crimes tribunals, constitutes a workable basis for enforcing compliance with humanitarian law. However, he expresses ambivalence regarding the value of the reprisal provisions in the 1949 Geneva Conventions. He lauds the prohibitions on reprisals against prisoners of war, the wounded, sick and shipwrecked, especially the fact that they are subject to no exceptions. Yet, he considers certain reprisals, including those against civilians, to perform 'an extremely valuable function' (p. 23) and warns that a comprehensive ban of reprisals could weaken the efficacy of the law. Accordingly, any prohibition should be based on a determination that '(1) the reprisal is unlikely to have any deterrent effect ...' or '(2) regardless of the efficacy of the reprisal, it can be dispensed with because other reprisals may be relied upon to produce the requisite deterrent effect' (p. 24).

Frits Kalshoven's 'Belligerent Reprisals Revisited' (Chapter 2) is a follow-up to his famous book on the subject, the second edition of which has recently been published.[1] He takes a rather critical position vis-à-vis belligerent reprisals, considering them a generally ineffective means for enforcing compliance with international humanitarian law – one that risks escalation of atrocities.

Reviewing the relevant provisions of the 1949 Geneva Conventions and the Additional Protocol, Kalshoven concludes that those in the latter instrument cannot 'be regarded as anything but rules of treaty law' (p. 37). He rejects the criticism that the prohibitions are unacceptable from a military point of view. In his opinion, the respective provisions, despite being 'essentially humanitarian in nature' (p. 42), have been 'so phrased that military considerations are heeded to the maximum' (p. 56). Recalling that the 1974–1977 Geneva Conference struggled with whether to agree upon specific prohibitions or ban belligerent reprisals altogether, Kalshoven suggests that those asserting the former position took a 'rather over-optimistic view of what reprisals ... can achieve, combined with an underestimation of the adverse effects inherent in such measures' (pp. 44–45). He reminds us that Article 90 of Additional Protocol I provides for an International Fact-Finding Commission as an appropriate means of ensuring compliance with international humanitarian law and warns states against issuing reservation to reprisal provisions in treaties.

Moving from the general to the specific, Kalshoven addresses areas with regard to which no formal prohibition of reprisals appears – methods and means of warfare, the 1925 Geneva Gas Protocol and internal armed conflict. He rejects the argument that indiscriminate attack under Article 51 of Additional Protocol I may be responded to by reprisal in kind, taking the position that the prohibition on reprisals therein encompasses the article in its entirety. As to other provisions on the conduct of hostilities, he highlights their humanitarian character and

[1] *Belligerent Reprisals* (2nd edn), Leiden: Martinus Nijhoff Publishers (2005). First published 1971.

points to the 1969 Vienna Convention on the Law of Treaties to 'demonstrate that application of the central idea in Article 60, paragraph 5 ... may lead to the conclusion that such reprisals are morally wrong' (p. 57). With regard to the 1925 Geneva Protocol, Kalshoven, while acknowledging that a considerable number of states parties have set forth reservations to it, argues that even in the case of a serious and systematic violation of the Protocol there is 'little utility in the initiation of all-out gas war in reaction' (p. 58). Finally, he cannot but concede that the law of non-international armed conflict contains no treaty rule prohibiting resort to reprisals. States either reject application of the concept in relation to non-state actors or are simply unprepared to abandon that means of enforcing compliance. Tempering this finding is his assertion (one equally embraced by the ICRC) that the relevant provisions on humane treatment are of such a fundamentally humanitarian nature that they must be considered absolute in character, allowing for no exceptions. And, from a practical perspective, he argues that reprisals would, in most cases, prove futile and risk escalation.

Ultimately, Kalshoven sees no way of advancing beyond Additional Protocol I with regard to the prohibition of reprisals in international armed conflicts. However, he stresses the necessity of ratification without reservations and the need to strengthen the Article 90 Fact-Finding Commission. As to non-international armed conflicts, he advocates the exploration of 'other ways' to improve the situation, especially by mobilizing public opinion through reference to international human rights law (p. 64).

'The Implementation of the Geneva Conventions of 1949 and of the two Additional Protocols of 1978' is the written version of G.I.A.D. Draper's 1979 Hague Academy lecture (the contemporaneous nature of the lecture explains the error in the date attributed to the Protocols in the titles). Draper defines 'implementation' as 'those devices, institutions and rules designed to monitor and ensure its observance' and 'enforcement' as the 'collection of mechanisms and rules available to the law of war to secure the restoration of observance when that law has been violated' (p. 65).

The essay begins by addressing the following issues: (1) the protecting power system; (2) dissemination and instruction; (3) legal advisers in armed forces; (4) the use of qualified persons; and (5) implementation of the law of non-international armed conflicts. As regards the protecting power system, Draper is unconvinced that Additional Protocol I abolished the deficiencies that had previously characterized the system because its success depends on consent. Moreover, in view of the unresolved issue of the relationship between the Conventions and the Protocol, it might be that 'any advance made by the conventions in common Articles 10/10/10/11, paragraph 3, is negated by Article 5(4) of the protocol, controlling the role of the ICRC as a substitute' (p. 74). Nevertheless, Article 5, paragraphs 5 and 6, are considered 'gains'.

Draper is equally unimpressed by the provisions on dissemination and instruction, although he concedes that, if carried out in good faith, they will limit the number of individuals who can claim ignorance of international humanitarian law. In that context, Draper reminds us that the 1907 Hague Convention IV already requires the issuance of instructions to the armed forces that conform to international humanitarian law. Moreover, doing so is a consequence of the general obligation to carry out treaty obligations in good faith. The obligation under Additional Protocol I to introduce 'the legal adviser to an advisory role affecting combat operations' (p. 80) fosters compliance.

With regard to non-international armed conflicts, Draper notes that, under common Article 3 of the 1949 Geneva Conventions, '[m]onitoring implementation has rarely proved possible' (p. 83) and that Additional Protocol II 'does little to reinforce or contribute modes for implementation' (p. 84). He rejects the assertion that the implementation machinery of the Geneva Conventions is applicable to such conflicts qua customary international law. In sum, he concludes that the 'mechanisms to ensure implementation of the modern law of war are weak' and that '[a]t the present time it is probable that the developments in the humanitarian law of armed conflicts have outrun its capacity to supervise its own observance' (p. 86).

Draper next explores the philosophical and practical considerations that have contributed to the emergence of international humanitarian law over the past centuries (pp. 87ff.). He reminds us that since the seventeenth century three principal means of enforcement of the law of war by self-help have emerged: (1) reprisals, (2) hostages and (3) punishment of war criminals who have fallen into enemy hands. In his estimation, the Geneva Conventions and Additional Protocol I have added little to enforcement. The taking of hostages has been forbidden and reprisals have been widely eliminated; thus, '[t]he main burden of enforcement of the modern law of war has been imposed upon the penal repression of "grave breaches"'. The obligation to pay compensation, laid down in the 1907 Hague Convention IV and reaffirmed in Additional Protocol I, forms part of the law, but is 'rarely applied' (p. 89). Hence, the Fact-Finding Commission under Article 90 of Additional Protocol I is the only new 'ancillary method of enforcement' (p. 89).

Draper's conclusions as to the effectiveness of the implementation and enforcement mechanisms contained in the respective treaties are less than glowing. It must be borne in mind, however, that they are based on an early assessment of the Additional Protocols and that in the meantime some of the deficiencies have proven less significant than feared. This does not diminish the value of Draper's essay because it brilliantly sets forth the underlying rationale of the respective rules and their historical context.

'The Role of Legal Advisers in the Armed Forces' by Leslie C. Green (Chapter 4), examines an aspect of implementation that Draper deals with only cursorily. It is one of the first analyses of Additional Protocol I's Article 82, its historical context and the practical problems surrounding its implementation.

According to Green, Article 82 is 'merely a recognition of practical necessity and the purpose that it aims to achieve is not quite so innovative as might appear', but, he admits, 'a treaty requirement to this effect is undoubtedly a new element' (p. 111). Nevertheless, the proper implementation of the obligation faces a variety of problems, especially in light of the widening scope of international humanitarian law and of the varying interpretations of its rules. Moreover, the hierarchic relationship between the commander and the legal adviser may prove problematic. Therefore, the parties to the Protocol must 'instil into their armed forces an entirely new approach to the law' (p. 119). Commanders must be aware that 'their legal advisers have a special role to play and that their advice must be heeded, regardless of rank' (ibid.).

It is also necessary to agree upon the exact meaning of the term 'at the appropriate level'. In order to prevent confusion, 'some further international agreement laying down the level of command at which the appointment of advisers is necessary' should be considered (p. 120). Finally, Green regrets that Additional Protocol I contains 'no indication of the type of

training that the legal advisers should be given or the type of person who should be selected' (p. 121). In this regard, he suggests either another international agreement, which he considers an 'idealistic solution' (p. 121), or the creation of training manuals and training courses by the ICRC and the International Institute of Humanitarian Law.

Green concludes by stressing that those who support international humanitarian law should be specialists in the field. In particular, the courses that they teach must be carefully prepared: 'After all, the legal advisers who are the products of their training will be responsible for ensuring that commanders to whom they are attached observe the provisions of the Conventions and the Protocol' (p. 122).

'The Man in the Field and the Maxim Ignorantia Juris Non Excusat', also by Leslie Green (Chapter 5), is a compelling plea for improvement in the knowledge of international humanitarian law applicable in both international and non-international armed conflicts. Green rightly observes that the grasp of humanitarian law by soldiers accused of having committed war crimes has been afforded insufficient attention, 'even though the inevitable defence of superior orders and the reaction to it of the tribunal concerned to a very extent are based on this factor' (p. 123). The maxim of *ignorantia juris non excusat* rather easily applies in a domestic context, but not with regard to international law, especially international humanitarian law, which is a highly sophisticated, and somewhat controversial, system.

Green thoroughly analyses the various binding and non-binding international instruments that have contained a dissemination obligation – a collection reaching back to the 1880 Oxford Manual. Seemingly, that obligation was considered necessary only in the context of purely humanitarian rules ('Geneva Law') and not of the law governing the conduct of hostilities ('Hague Law'). The 1949 Geneva Conventions have contributed to an improvement in this situation, as has the 1954 Convention on Cultural Property, although the latter lacks the necessary specificity. In addition, the conflicts in Korea and Vietnam had a positive impact insofar as the United States, *inter alia*, began to grasp the importance of teaching international humanitarian law to its armed forces.

Green welcomes the provisions of Articles 82 and 83 of the 1977 Additional Protocol I, but deplores the fact that no such obligations exist with regard to non-international armed conflicts. This situation reflects the reluctance of governments to educate their civilian population in matters bearing on civil war. Still, he concludes, if governments began to approach their dissemination obligations seriously, 'we would see the dawn of an era in which it will be true of the man in the field during combat, as it is for the civilian charged with a criminal offence, that *ignorantia juris non excusat*'.

Edwin M. Borchard's 'Private Pecuniary Claims Arising Out of War' (Chapter 6) is a thorough analysis of the law on compensation for losses of private property as of 1915. In view of the 1856 Paris Declaration and of the 1907 Hague Conventions, Borchard observes that 'private [property] rights during war have gained greater and greater recognition' (p. 143). Although Borchard only briefly refers to Article 3 of the 1907 Hague Convention IV, he is prepared to apply that provision to 'all violations of the laws of war besides those included in the Hague Regulations' (p. 145). In doing so, he distinguishes between authorized and unauthorized acts by members of the armed forces. The focus of his essay is on those rules of the *jus in bello* whose applicability depends on the existence of a state of war and which provide for private property loss compensation.

At the outset, Borchard emphasizes that the *jus in bello* applies to all property situated in enemy territory without distinction as to the nationality of the respective owner. While this is generally recognized for land warfare, there is no consensus on the criteria for determining the enemy character of private property at sea. The continental practice is to look to the owner's nationality; the Anglo-American rule is based on the test of (commercial) domicile. Of course, the enemy character of a ship is determined by the flag it legitimately flies. In that context, Borchard reminds us that neutral vessels acquire enemy character if they engage in certain acts, such as breach of blockade, non-neutral service or resistance to visit and search.

As regards war on land, private property is unprotected when damage is a direct result of belligerent acts, at least provided that such acts were in accordance with international humanitarian law. It is important to note that, according to Borchard, there is a legal presumption 'in favor of the regularity and necessity of governmental acts' (p. 155). Moreover, a state is exempted from liability for 'incidental and consequential results of a state of war' (p. 156) and for '[u]nauthorized pillage by uncontrollable soldiery' or 'wanton destruction of private property by unofficered soldiers', unless it can be proven that the offence was committed 'by authority of commanding officers' (p. 157).

The section on appropriation of private property deals with Articles 46, 49, 51, 52, 53 and 54 of the 1907 Hague Regulations. In principle, Borchard welcomes those provisions as improving the protection of private property, but criticizes their rather vague wording. In view of the 1856 Paris Declaration, the 1907 Hague Conventions and the (unratified) 1909 Declaration of London, Borchard devotes a separate section to war at sea. He reminds us of the belligerent right to interfere with enemy trade and – in the cases of contraband, blockade and non-neutral service – neutral trade. As regards the latter, Borchard provides valuable references to the decisions of prize courts and arbitral tribunals that have awarded indemnities for unlawful seizure, capture and destruction of neutral vessels and cargo.

Borchard's analysis is based on the *jus in bello* as codified in the respective treaties and as applied by arbitral commissions. It is not only a snapshot of the state of the law in 1915, but also an excellent examination of the customary rules on the legal status of private property in land and naval warfare.

In 'State Responsibility for Warlike Acts of the Armed Forces', Frits Kalshoven examines Article 3 of the 1907 Hague Convention IV and Article 91 of the 1977 Additional Protocol I. His interpretation of Article 3 of Hague Convention IV can be summarized as follows: (1) enemy and neutral civilians, not their respective states or combatants, are the 'sole intended beneficiaries of Article 3' (p. 183); (2) Article 3 is 'designed to cover fairly small-scale events', as distinguished from 'impersonal, large-scale, military operations such as long-distance bombardment' (p. 184); and (3) it only applies to acts of armed forces which are effectively subject to the government's instructions, thus excluding acts of a *levée en masse* or militia and volunteer corps. Kalshoven bases these conclusions on the article's drafting history, as well as a systematic interpretation of Article 3 in the light of those provisions of the 1907 Hague Regulations that provide for private pecuniary claims. Despite the absence of actual application of Article 3, a comparison with the general rules on state responsibility reveals that any act, including those that are not performed by someone acting in his capacity as a state organ, result in the liability of the respective state.

Given the drafting history of Article 91, Kalshoven characterizes the provision as inter-state; but that finding has no bearing upon Article 3's scope of applicability. Moreover, Article 91 applies to the conduct of all armed forces of a state, 'whether regular or irregular' (p. 198), and to all violations of international humanitarian law.

Kalshoven concludes with a short analysis of the *Nicaragua* judgment, especially the concept of 'effective control', and UN Security Council practice in the aftermath of the 1991 Iraq–Kuwait War, paying particular attention to Resolutions 687 and 692. Although some would hold that Iraq's obligation to compensate those suffering damage from the illegal war is an exclusive matter of the *jus ad bellum*, Kalshoven considers the practice to be a 'remarkable step forward'.

'The History of the Grave Breaches Regime' by Yves Sandoz (Chapter 8) is a *tour de force* not only of the development of the grave breaches regime, but also of the broader international law of war crimes. Sandoz begins by reminding readers that despite the Lieber Code's emphasis on military necessity, the Code set absolute limits and provides for penal sanctions. While some of the sanctions bore on the maintenance of internal discipline, others were based on 'fundamental principles of human dignity, honour and chivalry' (p. 214). During the second half of the nineteenth century, views on penal sanctions for violations of the law of war were divided. Proposals for international penal sanctions and even an international criminal court went unheeded. The same held true for coordinating and standardizing national legislation, as suggested during the 1874 Brussels Conference. Nevertheless, Sandoz describes these proposals as 'a first step in the direction of a common definition of grave breaches' (p. 215).

Sandoz then turns to the aftermath of the First World War and the subsequent Treaty of Versailles, especially to the work of the 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties". One of the Commission's products was a non-exhaustive list of 32 crimes, about which Sandoz is unenthusiastic because 'it cannot be viewed as the result of a serious and systematic work of scholarship carried out to show established doctrine or state practice' (pp. 220–21). For instance, with regard to the criminal responsibility of heads of state, he concludes that it 'is ad hoc and arguably too limited in scope to constitute an important precedent for the notion that immunities do not apply to a head of state' (p. 222). Nevertheless, he characterizes Articles 228 to 230 of the Treaty of Versailles as a 'major historical event' (p. 223), for '... the idea of an international criminal court and code ... continued to exercise an influence in the quest for means to curb international violence' (p. 223).[2]

As to the grave breaches regime, Sandoz emphasizes that the 1949 Geneva Conventions 'impose punishments for the identified grave breaches and this is specified as being of international concern' (p. 226). It must be borne in mind that, under the Geneva Conventions, grave breaches could not be equated with war crimes. Rather, the regime 'maintain[ed] a separate approach' (p. 227). Because the Geneva Conventions were not designed to 'work out international penal law' (ibid.), the conditions for prosecution and punishment of grave breaches were left to the national courts.

The distinction between grave breaches and war crimes became obsolete with the adoption of the 1977 Additional Protocol I. All grave breaches under the Conventions and the Protocol

[2] Citing J.E. Willis, *Prologue to Nuremburg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Westport, CT and London: Greenwood, 1982, p. 113.

constitute war crimes. In that context, Sandoz regrets the fact that it proved impossible to agree upon a grave breaches regime for non-international armed conflict. Yet, in light of the establishment of the ICTY, the ICTR and the ICC, he suggests that in 1995 'the notion that serious violations of international humanitarian law constitute war crimes, whether committed during international or non-international armed conflict, was finally accepted' (p. 229). Sandoz closes by pointing out that despite the merger of the grave breaches regime and the concept of war crimes, important differences between Additional Protocol I and the ICC Statute remain.

In 'The Universality Principle and War Crimes' (Chapter 9), Yoram Dinstein analyses the principle of universality which he characterizes as an 'exceptional measure granting the State special extraterritorial power' that is 'limited to specific offenses defined by international law'. Accordingly, it must 'be exercised strictly in accordance with limitations imposed by that law' (p. 237).

Dinstein offers convincing evidence of the customary character of the universality principle in the context of war crimes, but also stresses that those technical violations of international humanitarian law that do not constitute such crimes *strictu sensu* are not covered by the principle. He distinguishes the universality from the protective principle; the latter protects the single state, whereas the former 'lends its aegis to the collectivity of States'. Consequently, there is no 'genuine overlap' between them (p. 240).

The *aut dedere aut judicare* formula and the practical challenges surrounding its implementation are examined, as is the closely related issue of whether certain states enjoy priority in exercising jurisdiction over other states under the universality principle. Dinstein maintains that customary international law is silent on the matter, but believes it is worth taking certain international conventions into consideration in that regard, even though they are not directly germane to war crimes. He suggests that the 'nonbinding preference scheme may be looked upon with favor in that setting too' (p. 244).

For Dinstein, concurrent jurisdiction under the universality principle can be exercised jointly – that is, on a multinational level. Hence, the establishment of the ICTY could be characterized as a joint exercise of universal jurisdiction by means of a UN Security Council resolution. If an international tribunal enjoys jurisdiction, it will regularly be endowed with primacy over national courts. The problem of double jeopardy in situations of national and international jurisdiction, although not settled in customary international law, can be solved by applying the principle of *non bis in idem*, provided that the respective act has not been tried as an ordinary crime and the national court proceedings were effective, impartial and independent. Finally, Dinstein analyses the jurisdiction to prescribe, the jurisdiction to adjudicate and the jurisdiction to enforce in light of the universality principle.

Hersch Lauterpacht's 'The Law of Nations and the Punishment of War Crimes', published in 1944 and reproduced here as Chapter 10, is a modified version of a memorandum the author submitted in 1942 to the Committee on Crimes against International Public Order set up by the International Commission for Penal Reconstruction and Development. It is a compelling call for punishment of persons guilty of war crimes within the framework of a legal process. He believes that '[in] the existing state of international law it is probably unavoidable that the right of punishing war criminals should be unilaterally assumed by the victor' (p. 258). Consequently, Lauterpacht begins by scrutinizing the legal basis of the demand for surrender

of war criminals. He first proves the existence of a rule of international law according to which a belligerent is entitled to punish for war crimes those members of the enemy armed forces who have fallen into its hands. In doing so, he demonstrates that such punishment is not a matter of 'victor's justice'. Dissatisfied with merely citing Vitoria, Grotius, Wolff, Moser and the Institute of International Law, he locates a right to punish war crimes in the territorial principle, which includes violations in territory or national airspace under military occupation and criminal acts committed on the high seas against vessels flying the belligerent's flag. Further considerations include the rights to punish those who have committed acts against safety or the belligerent's nationals.

Lauterpacht emphasizes the importance of enforcing international, rather than municipal, law. In that context, he convincingly argues that the laws of war 'are binding not upon impersonal entities, but upon human beings' (p. 263) and that '[t]he immediate subjection of individuals to the rules of warfare entails, in the very nature of things, a responsibility of a criminal character' (p. 264). Moreover, their force flows from the fact that they are 'dictated by generally recognized principles of humanity' (ibid.).

On this basis, the right to punish enemy war criminals for violations of the laws of war is justified, as is any argument that an exercise of such criminal jurisdiction amounts to vindictive (and procedural) retroactivity. The right to demand their surrender from the defeated state follows from the normative fact that 'international law permits the punishment of war criminals ... regardless of the manner in which they happen to fall into his power' (p. 266). The source of that right lies in the exercise of military authority over foreign territory – that is, the law of belligerent occupation.

Having established these rights, Lauterpacht examines their international law limitations – the plea of superior orders, international humanitarian law's uncertainties and reprisals. As to superior orders, he stresses that the law 'does not reduce the soldier to the status of a mere mechanism' and 'adds the substantial qualification to the effect that obedience is due only to lawful orders' (p. 270). However, his analysis of municipal legal orders reveals no consensus on the issue, and there is no international judicial authority on the subject. Accordingly, Lauterpacht considers it necessary 'to approach the subject of superior orders on the basis of general principles of criminal law, namely, as an element in ascertaining the existence of *mens rea* as a condition of accountability' (p. 272).

With regard to the uncertainties, he concludes that 'there may be lacking ... that degree of *mens rea* which ... constitutes an essential condition of criminality' (p. 273). Pointing to the difficult issue of aerial bombardment, he doubts whether criminal tribunals are 'the proper agency for solving controversial and difficult problems of the law of war' (p. 274). Such uncertainties have a direct bearing on the issue of superior orders.

As to reprisals, Lauterpacht maintains that 'as a rule, an act committed in pursuance of reprisals, as limited by international law, cannot properly be treated as a war crime' (p. 275). Moreover, '[t]he element of reprisals may have a significant and perplexing bearing upon the plea of superior orders' (ibid.). However, this does not necessarily mean that reliance on a superior order justified as a reprisal will result in impunity because 'it does not seriously affect the most potent source of war crimes which originates in the lawlessness and the brutality of the occupying State' (p. 276).